United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

OCTOBER TERM, 1909.

No. 2060.

668

FRANK H. HITCHCOCK, POSTMASTER-GENERAL OF THE UNITED STATES, APPELLANT,

vs.

FRANK TOUSEY, PUBLISHER, A CORPORATION.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED SEPTEMBER 10, 1909.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

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FRANK H. HITCHCOCK, POSTMASTER-GENERAL OF THE UNITED STATES, APPELLANT,

vs.

FRANK TOUSEY, PUBLISHER, A CORPORATION, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 16, 1909.

In the Court of Appeals of the District of Columbia.

No. 2060.

FRANK H. HITCHCOCK, &c., Appellant,
vs.
FRANK TOUSEY, &c.

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a Supreme Court of the District of Columbia.

Equity. No. 27280.

FRANK TOUSEY, Publisher, a Corporation,
vs.
FRANK H. HITCHCOCK, Postmaster-General of the United States.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Bill.*

Filed August 8, 1907.

In the Supreme Court of the District of Columbia.

Equity. No. 27280.

FRANK TOUSEY, Publisher, a Corporation,
v.
GEORGE VON L. MEYER, Postmaster-General of the United States.

To the Honorable the Supreme Court of the District of Columbia, sitting in Equity:

Your complainant, Frank Tousey, Publisher, a corporation, respectfully shows as follows:

I. Your complainant is a citizen of the United States and a corporation organized under the laws of the State of New York having its principal place of business in the city of New York, and brings this bill in its own right.

II. The defendant is a citizen of the United States and a resident of the District of Columbia, and said defendant is the duly appointed and qualified Postmaster-General of the United States and is herein sued as such Postmaster-General.

III. Your complainant is now, and during the times hereinafter mentioned was, a corporation engaged in the publishing business under the firm name of "Frank Tousey, Publisher" and had,
2 and still has, a place of business in the city of New York in the State of New York. The publishing business of your complainant was established more than thirty-five years ago, during the whole of which time your complainant and its predecessor in title, have been lawfully engaged in the business of publishing periodical publications similar to those hereinafter specifically mentioned.

IV. The complainant is now and was at the time of the acts of the defendant hereinafter complained of the sole owner, proprietor and publisher of a periodical publication hereinafter set out and, until the acts of the defendant hereinafter complained of such publication was, from the date of its establishment, received and transmitted through the United States mails at the rates prescribed by law for periodical publications of the second class. The said publication and the date of its establishment are respectively as follows:

Work and Win, Established in December, 1898.

V. Said periodical publication is regularly issued at stated intervals as frequently as four times a year, to wit, at the stated interval of once a week, bears the date of issue and is numbered consecutively, and has been so regularly and consecutively issued since its establishment to the present time.

Said publication has been and is now regularly issued from the known office of publication, to wit, the office of publication of Frank Tousey, Publisher.

Said periodical publication is formed of printed paper sheets without board, cloth, leather or other substantial binding
3 such as distinguish printed books for preservation from periodical publications. Said periodical publication is originated and published for the dissemination of information of a public character and is devoted to literature.

Said publication is not designed primarily for advertising purposes or for free circulation or for circulation at nominal rates.

Said periodical publication has a legitimate list of subscribers.

Your complainant further says that said periodical publication has complied, and now complies, with all the terms, conditions and requirements of the laws of the United States relating to mailable matter of the second class and that said periodical publication is matter of the second class; and your complainants files herewith copies of said publication, which in respect to the requirements of mailable matter of the second class are substantially similar to each and every other copy of said publication, the same being exhibits 3, 4, 5 and 6 to be read as a part hereof.

VI. The publication hereinbefore mentioned was, upon proper application, duly admitted by the Post Office Department of the United States to the second class of mail matter for transmission in the mails of the United States at the second class rates of postage provided by law for such matter; and in pursuance thereof the postmaster of the United States at New York did execute, issue and deliver to the complainant, a formal certificate of entry of mail to the second class matter as evidence of such determination, finding and decision that said publication was entitled to such trans-
4 mission. The character of the publication has not since been changed.

Copies of said certificate of entry are hereto annexed, marked Exhibit 1, and are prayed to be read and considered as a part of this bill. The date of said certificate is as follows: Work and Win, December 8, 1898.

VII. From the date of said certificate of entry until the wrongful acts of the defendant hereinafter complained of the publication aforesaid was regularly, that is to say, every week, received and transmitted by the Post Office Department through the mails of the United States as mailable matter of the second class.

VIII. Long prior to the establishment of your complainants' publication aforesaid and prior to the passage of the act of March 3, 1879, publications similar in all respects to the publication aforesaid were regularly admitted, received and transmitted through the mails of the United States as periodical publications and mailable matter of the second class, and that such publications were, by all publishers, newsdealers and agents, as well as by the public in general, deemed, held and regarded to be periodical publications and were oridinarily and usually spoken of and treated as such, and that it was in the light of this universal recognition of the periodical character of such publications and of their rights to transmission at periodical rates in common with other periodical publications that the act of Congress of March 3, 1879, was enacted and the definitions and conditions mentioned in said act were expressly intended and designed to include and embrace publications of the character of those hereinbefore mentioned.

5 IX. In recognition of the universal understanding of the term periodical publications, as well as of the true intent and meaning of the said act of March 3, 1879, the Post Office Department did, from and after the passage of said act, admit, recognize, treat and transmit publications in all respects identical with the publication of your complainant through the mails as mailable matter of the second class and so continued to do until the 27th day of July, 1907, when the publication of the complainant was unlawfully and wrongfully excluded from the said second class.

X. The complainant further says that at the present time and subsequent to the exclusion of your complainant's publication the said Post Office Department recognizes, admits and treats, under the said act of March 3, 1879, as publications of the second class, divers other publications similar to your complainant's publications

and in respect of no condition established by the said act of March 3, 1879, to be distinguished from them.

Your complainants further say that among the publications so admitted, held, treated and transmitted by the Post Office Department are the following publications, to wit, The Black Cat, the All Story Magazine, and divers other publications, copies of which your complainant respectfully craves leave to refer to as exhibits and parts of this bill at the hearing of this cause.

And your complainant further says that the exclusion of its periodical publications aforesaid under the circumstances just mentioned constitutes a denial of justice and a violation of the
6 fundamental principle that the laws of the United States must be applied with equality to all citizens subject thereto; your complainant avers and complains that such exclusion denies to it the equal protection of the laws.

X. On, to wit, May 17, 1907, your complainant received from the Third Assistant Postmaster-General, a letter or notice that it would be granted a hearing at the office of said Third Assistant Postmaster-General Washington, D. C., at 2 o'clock, p. m., on Wednesday, June 12, 1907, to show cause why the authorization of the admission of such publication to the second class of mail matter under the act of March 3, 1879, should not be revoked and why the third class rate of postage should not be charged for the transmission of that class of mail, upon the following ground: "That the issues of such publication do not constitute a newspaper or other periodical publication as required by sections 7, 10, 12 and 14 of the act of Congress of March 3, 1879 (Chap. 180, I supp. R. S., page 246) governing the mailable matter of the second class, but are in fact books, which, under section 17 of said act, are third class matter and chargeable, when sent in the mails, at the rate fixed by law for that class of matter." By said notice complainants were informed that their "answer, in writing, must be submitted on or before June 12, 1907," and furthermore, that "should they desire to avoid the expense and trouble incident to a trip to Washington their written answer would be given the same full and painstaking consideration as though they appeared in person or by representative." A copy of said notice in the case of Work and Win is annexed hereto and
7 marked Exhibit 2 and prayed to be read as a part hereof.

XII. In response to said notice your complainant did, by its representative, W. H. Heines, appear at the office of the Third Assistant Postmaster-General at 12 o'clock on June 11, 1907, and in anticipation of the hearing on the following day, filed a printed statement and argument in which the points to be urged against such rule were briefly set out and in which your complainants stated that if the Third Assistant Postmaster-General should not be satisfied from the consideration of said printed argument that the issues of the publication constituted a periodical publication, it requested a further opportunity to present argument. At the time of leaving said printed argument the representative of your complainant stated to the clerk of the Third Assistant Postmaster-General, the only person he could see, that he would return on the following

day, to wit, 2 o'clock p. m., June 12, 1907, to make further answer to the rule, and to participate in the hearing therein designated. On the day following, at the hour appointed in a citation in the case of the Tip Top Weekly also represented by said Heines, the representative of your complainants did appear at the office of the Third Assistant Postmaster-General in response to said rule to show cause, but he was unable to obtain an audience with or even to see the Third Assistant Postmaster-General. The representative of your complainants was, however, referred to the Superintendent of the Classification Division of the Post Office Department, who stated that

8 he was not advised that he was to conduct a hearing and was unprepared to proceed with it. Neither in the office of the Third Assistant Postmaster-General nor in the office of the Superintendent of the Classification Division was the Representative of your complainant informed or advised beyond what was already contained in the so-called rule to show cause of any ground, reason, matter or thing which was to be urged against the right of the said publications to admission to second class matter or of any ground, reason matter or thing to be alleged for their exclusion from said second class.

The said Superintendent thereupon made a note of the appearance of said Heines and said Heines stated he would remain at the New Willard Hotel to be within call.

XIII. Your complainant believes that the proceedings aforesaid, had in the office of the Third Assistant Postmaster-General, do not constitute a hearing according to the provisions and within the intent and meaning of the act of March 3, 1901 (31 Stats. L., 1107) whereby it is provided:

"When any publication has been accorded second class mail privileges the same shall not be suspended or annulled until a hearing shall have been granted to the parties interested."

And your complainant is further advised and avers that the action hereinafter mentioned purporting to be based upon a hearing granted to your complainant on June 11, 1907, constitutes a deprivation of the property of your complainant without due process of law.

XIV. On July 30, 1907, your complainant received from the postmaster at New York a letter, under date of July 29, 1907, trans-

9 mitting to your complainant a letter from the Third Assistant Postmaster-General, revoking the authorization for mailing the publication aforesaid at the second class rates of postage. Also a copy of the opinion of the Assistant Attorney General for the Post Office Department referred to in the letter of the Third Assistant Postmaster-General. By the said letter the said postmaster notified your complainant that any copies of these publications mailed thereafter would be subject to the postage rate for third class matter, one cent for each two ounces or fraction thereof, which must be prepaid by stamps affixed upon each separately addressed copy or package of unaddressed copies. Copy of said letter is hereto annexed, marked Exhibit 3, and prayed to be read and considered as a part of this bill.

The copy of the letter of the Third Assistant Postmaster-General referred to in letter of the postmaster recited, under date of July 26, 1907, that the Assistant Attorney General for the Post Office Department, upon consideration of the arguments of the counsel for the publishers (by which your complainant supposes was meant the statement and argument submitted as aforesaid) had held that the publications in question were not "periodical publications" within the meaning of the law, but "books," and therefore not entitled to transmission at the second class rates of postage. The Third Assistant Postmaster-General proceeded to state that in that opinion he concurred, and accordingly decided that the issues of the "Work and Win," do not constitute newspapers or other periodical publications as required by sections 7, 10, 12, and 14 of the act of

10 Congress of March 3, 1879 (chap. 180, I Supp. R. S., page 246), governing "mailable matter of the second class, but are, in fact, books which, under section 17 of said act, are third class matter, chargeable when sent in the mails at the rate fixed by law for that class of mail matter. And that therefore the authority granted for the acceptance of said publications for mailing at the second class rates of postage is hereby revoked."

A copy of said letter of the Third Assistant Postmaster-General is hereto annexed, marked Exhibit 7, and prayed to be read and considered a part of this bill. Enclosed in the said letter of the postmaster transmitting the decision of the Third Assistant Postmaster General was the opinion of the Assistant Attorney General for the Post Office Department referred to therein, upon the question of law whether your complainant's publication complied with the requirements of the act of March 3, 1879.

XV. Your complainant further avers that the question whether the said publication is a periodical publication within the meaning of the law and therefore entitled to transmission as second class matter is a pure question of law, to be determined by a comparison of the said publication itself with the condition set out in the said act of March 3, 1879.

Your complainant further avers that the decision of the said Third Assistant Postmaster General that the issues of the said publication do not constitute periodical publications as required by sections 7, 10, 12 and 14 of the said act, is a manifest error of law,

11 and should not avail to deprive your complainant of the right to the transmission of said publication through the mails of the United States in accordance with the requirements, terms and provisions of said act.

Your complainant further avers and says that the said supposed decision of the Third Assistant Postmaster General, purporting to be based upon a construction of said act of March 3, 1879, is simply an arbitrary, capricious and unlawful conclusion, imposing upon the right to such transmission unspecified and undefined requirements in excess of and in addition to those established by the statutes of the United States, and unauthorized by the statute under which he assumed to act, and wholly beyond his power and jurisdiction.

Your complainant further avers that in pronouncing the decision

aforesaid the said Third Assistant Postmaster General proceeded upon no evidence or facts before him other than those apparent by a comparison of the publications themselves with the requirements of said statute.

And your complainant is further advised and avers that the said decision of the Third Assistant Postmaster-General is a departure from and reversal of the uniform, constant and established construction of said act, placed upon the same by the Post Office officials at the time of its enactment, and continued without interruption down to the time of the exclusion of this publication, as well as a reversal of the legislative construction thereof.

And your complainant is advised and believes that such decision, being a clear mistake of law as applied to the apparent and
12 admitted facts, is absolutely null and void, and this honorable court has accordingly power and jurisdiction to grant relief against the same.

XIV. Your complainant further shows that the postmaster of the United States for the city of New York, in pursuance of said supposed decision of the said Third Assistant Postmaster-General, immediately and before communicating said decision to complainant refused to accept the current issues of the publication aforesaid, for mailing in said postoffice at the second class rates of postage, and threatens now and hereafter at each successive issue of said publication to refuse to accept the same at said second class rates of postage.

XVII. Your complainant further shows that the publication aforesaid, is a periodical publication complies with all the conditions and requirements established by law for the admission of publications to the second class mail matter, and is a periodical publication within the intent and meaning of the said act of March 3, 1879, and therefore entitled to transmission as such. That the periodicity of the issue of said publication is real and not apparent, that the demand of the reader for said publication is a periodical demand, and that such demand can be met only by a periodical issue. That such publication has not only a legitimate list of subscribers, within the intent and meaning of the act of March 3, 1879, but has as a part thereof, a large number of individual reading subscribers who subscribe for the same for the periods for which subscriptions to periodical publications are usually taken; that the periodicity of said publication is an essential element of its
13 character, and that if the said publication is denied admission to the mails as a periodical publication it would be impossible for your complainant to continue the publication thereof or to meet by any other form of publication the demand therefor. Your complainant further says that the copies of Work and Win circulated through the mail are practically all current copies and not back numbers; that the only back numbers so transmitted are a minute fraction of the total issue not in excess of the usual demand for back number- of periodicals. The said publication can be furnished to the subscribers and readers thereof only by means of the recognized news agencies and through the mails of the United

States; that if the second class mailing privilege is taken away from said publication your complainant will be unable to send said publication to various parts of the United States where the only possible means of communication with the subscriber is through the mails of the United States, such exclusion from the mails will amount to an absolute prohibition and interdict upon the circulation and distribution of said publication.

XVIII. Your complainant further avers that the said publication is principally devoted to literature and contains, in each successive issue thereof, continued juvenile fiction of literary merit; that such literature is pure and wholesome in tone, and so far as it deals with adventure deals with it in the same way and in the same spirit in which it is dealt with by the recognized masters of juvenile fiction. Your complainant further avers that the rest of the contents of said publication is selected miscellany usual to periodicals, and
14 that in no respect does any of the contents contravene any provisions of the postal laws of the United States.

XIX. Your complainant, relying upon the right to have its said publication transmitted through the mails of the United States upon no other condition than compliance with the statutes of the United States in that regard, has proceeded from time to time to invest large sums in the conduct, management, and development of the business of printing and publishing said weekly publication; to that end it has at great expense installed machinery and appliances suitable for no other purpose than the production of said publication; that if the said invalid order of the Third Assistant Postmaster General is put into execution by the postmaster at New York, not only will your complainant be compelled to suspend the publication of said publication, but the machinery and appliances aforesaid will become wholly useless to your complainant, and your complainant will be deprived of the value of the same, which value is in excess of the sum of ($5,000) Five Thousand Dollars.

XX. Your complainant says that its right to the transmission of its said publication through the mails of the United States at the second class rates of postage is a right of property dependent solely upon the laws of the United States in that regard, and that the decision of the Third Assistant Postmaster-General aforesaid, proceeding upon a clear mistake of law and imposing, as it does, unnamed and unspecified requirements beyond compliance with the provisions of the statutes of the United States will, if the same be put into execution by the postmaster of the City of New York, as
15 he now threatens to do, take from your complainant the right conferred upon it by the said statutes to the transmission of the publication aforesaid, and thus deprive it of its property without due process of law, contrary to the provisions of the Constitution of the United States in that regard.

And your complainant further avers that the said property right to the transmisson of the said publication at the second class rates of postage, irrespective of the value of the machinery and appliances aforesaid, exceeds in value the sum of Five Thousand Dollars ($5,000).

For as much as your complainant is without a plain, adequate and complete remedy at law, and because if remediable at law relief could only be obtained by a multiplicity of suits, your complainant prays

1. That the United States writ of subpœna may issue to the defendant, commanding and enjoining him to appear at a date named therein and answer the exigencies of this bill.

2. That your complainant may be declared entitled to have the publication aforesaid entered, received and transmitted through the mails as mailable matter of the second class under the provisions of the act of Congress approved March 3, 1879, and at the rate provided by law for mailable matter of that class.

3. That it may please this honorable court to issue an injunction restraining the defendant, his agents and subordinates, from revoking the authority heretofore granted for the acceptance of
16 the publication aforesaid for mailing at the second class rates of postage, and requiring and commanding said defendant, his agents and subordinates, to receive the said publication and transmit the same through the mails of the United States as mailable matter of the second class and at second class rates.

4. That it may please the court also to grant a preliminary restraining order and injunction, restraining the said defendant, his agents and subordinates, as hereinbefore prayed, during the pendency of this suit.

5. That your complainant may have such other and further relief as in equity it may be entitled to and as to the court may seem meet and proper.

FRANK TOUSEY, *Publisher,*
By SINCLAIR TOUSEY, *President.*

In presence of
WM. H. ROCKWOOD.

H. H. GLASSIE,
J. J. DARLINGTON,
Sol'rs for Complainant.

STATE OF NEW YORK,
City & County of New York, ss:

Personally appeared Sinclair Tousey and made oath that he is now and for several years last past has been president of "Frank Tousey, Publisher," the corporation named as the complainant in the above bill, and that by means of his office he has particular knowledge of the matters stated in said bill, and that he has read the above bill by him subscribed and knows the contents thereof, and that the same is true of his own knowledge, save only as to the matters therein stated upon the information and belief of the
17 complainant, and as to these matters he is so informed and believes them to be true.

SINCLAIR TOUSEY.

Subscribed and sworn to before me this 7th day of August, 1907.

[SEAL.]

WM. H. ROCKWOOD,
Notary Public for N. Y. Co.

18 EXHIBIT No. 1.

27280.

TOUSEY, Publisher,
v.
MEYER, Postmaster-General.

3505.

Certificate of Entry of Publication as Second-Class Matter.

POST OFFICE AT NEW YORK, N. Y.,
December 8th, 1898.

I hereby certify that the Work and Win a Weekly published at this place, has been determined by the Third Assistant Postmaster to be a publication entitled to admission into the mails at the pound rate of postage, and entry of it as such is accordingly made upon the books of this office. Valid while the character of the publication remains unchanged.

C. VAN COTT,
Postmaster,
Per E. M. MORGAN,
Assistant Postmaster.

19 EXHIBIT No. 7.

C. N. 31271.

(Copy.)

Post Office Department,
Third Assistant Postmaster General,
Division of Classification.

WASHINGTON, *July* 26, 1907.

Postmaster, New York, N. Y.

SIR: In connection with the rule to show cause, you are informed that a hearing was given to the publishers of "Pluck and Luck," "Secret Service, Old and Young King Brady Detectives," "Work and Win," and "The Liberty of '76'" at this Office on June 12, 1907.

The arguments of the counsel for the publishers were considered and submitted to the Assistant Attorney General for the Post Office Department, who held that the publications in question were not

"periodical publications" within the meaning of the law, but "books" and therefore not entitled to transmission at the second class rates of postage.

In this opinion I concur and accordingly decide that the issues of "Pluck and Luck" "Secret Service, Old and Young King Brady Detectives," "Work and Win" and "The Liberty Boys of '76'" do not constitute newspaper or other periodical publications as required by sections 7, 10, 12 and 14 of the Act of Congress of March
20 3, 1879 (ch. 180, 1 Supp., R. S., page 246), governing "mailable matter of the second class," but are in fact books, which, under section 17 of said Act, are fixed by law for that class of mail matter.

Therefore, the authority granted for acceptance of "Pluck and Luck," "Secret Service, Old and Young King Brady Detectives," "Work and Win" and "The Liberty Boys of '76'" for mailing at the second class rates of postage is hereby revoked and you are directed to enter that fact upon the records of your post office.

You will require postage at the third class rate—one cent for each two ounces or fraction thereof—to be prepaid by stamps affixed upon each separately addressed copy or package of unaddressed copies of the publication hereafter mailed at your office.

A copy of the opinion of the Assistant Attorney General for the Post Office Department referred to is herewith enclosed to be handed to the publishers for their information.

Respectfully,

(Signed) A. L. LAWSHE,
Third Assistant Postmaster Gen'l.

21 *Rule to Show Cause.*

Filed August 8, 1907.

In the Supreme Court of the District of Columbia.

Eq'y. 27280.

FRANK TOUSEY, Publisher,
v.
GEORGE VON L. MEYER, Postmaster General.

Upon consideration of the bill and the application for injunction pendente lite it is ordered, the 8th day of August, 1907, that the defendant show cause on Monday, August 12th, 1907, at 10 o'clock A. M. why injunction pendente lite should not be granted as prayed:

Provided that a copy of this order be served on the defendant, or the acting Postmaster General, on or before Friday the 9th day of August, 1907.

JOB BARNARD, *Justice.*

Marshal's Return.

Served copy of the within order on George von L. Meyer, Postmaster-General of the U. S. by service on A. L. Lawshe, acting Postmaster-General.

August 8, 1907.

AULICK PALMER, *Marshal.*
S.

22 *Restraining Order.*

Filed August 12, 1907.

In the Supreme Court of the District of Columbia.

Equity. No. 27280.

FRANK TOUSEY, Publisher, a Corporation, Complainant,
vs.
GEORGE VON L. MEYER, Postmaster General of the United States, Defendant.

Upon consideration of the bill of complaint of the above named complainants and the rule to show cause issued thereon on August 8, 1907, and upon the appearance of the Attorney of the United States for the District of Columbia in response to said rule, it is this 12th day of August, 1907, by the court

Adjudged and ordered that the defendant, the Postmaster General, his assistants, deputies, agents and subordinates, be and they are hereby restrained and enjoined, until the further hearing of this cause upon motion of either party from revoking the authority heretofore granted for the acceptance of the publication "Work and Win" for mailing at the second class rates of postage, and that the said defendant, his assistants, deputies, agents and subordinates be and they are hereby restrained from refusing to accept said publication for mailing at the second class rates of postage and from
23 interfering with the transmission of the same at said second class rates under the provisions of the certificate of entry of December 8, 1898. Provided that the complainants give the usual undertaking required by Equity Rule No. 42.

JOB BARNARD, *Justice.*

Answer.

Filed November 5, 1907.

In the Supreme Court of the District of Columbia.

Equity. No. 27280.

FRANK TOUSEY, Publisher, a Corporation,
v.
GEORGE VON L. MEYER, Postmaster General of the United States.

This defendant now and at all times hereafter, reserving all and all manner of benefit and advantage to himself of exception to the

many errors and insufficiencies in said bill contained, for answer thereto, or unto so much or such parts thereof as this defendant is advised is material for him to make answer unto; answers and says:

I–III.

This defendant admits the allegations of paragraphs, one, two, and three of the bill of complainant, with the exception of
24 the allegation of paragraph three that complainant has been since the establishment of its publishing business, more than thirty-five years ago, "lawfully engaged in the business of publishing periodical publications similar to those hereinafter specifically mentioned," the import of which is that the publication entitled "Work and Win" is a periodical, and this he denies, and avers that while the publishing business of complainant may have been established more than thirty-five years ago as stated, said publication is not a periodical, but is in fact a book.

IV.

This defendant is informed and believes that the complainant is now and was at the time of the acts complained of, the sole owner, proprietor and publisher of the publication entitled "Work and Win;" that said publication was from the date of its establishment, to-wit, December, 1898, received and transmitted through the United States mails at the rates prescribed by law for matter of the second class, but denies that said publication is a periodical and avers on the contrary that it is in fact a book.

V.

This defendant is informed and believes that the publication designated "Work and Win" is regularly issued at stated intervals as frequently as four times a year, to-wit, at the stated interval of once a week, bears the date of issue, and is numbered consecutively, and for aught that he knows to the contrary has been so regularly and consecutively issued since its establishment to the present time;
and has been and is now so regularly issued from the known
25 office of publication of the complainant; and admits that said publication is formed of printed paper sheets, without board, cloth, leather or other substantial binding, such as distinguishes printed books for preservation from periodical publications. But this defendant avers that although said publication be regularly issued from the known office of complainant as frequently as four times a year, and be numbered consecutively and be formed of printed paper sheets, without board, cloth, leather or other substantial binding, such as distinguishes printed books for preservation from periodical publications, and thus complies with the outward characteristics and conditions prescribed by law for mailable matter of the second class, nevertheless, internally, in substance and in general contents it does not have the characteristics of said class of mail matter, but is in fact a book, and as such is included in the third class of mail matter as designated by law.

This defendant further avers that said publication does not have the characteristics of the second class of mail matter as prescribed by law, in that there is no connection between the different numbers thereof in the nature of the articles appearing in them, and in that the publication implies no continuity of literary character, such as distinguishes periodical publications from books, but each publication, issue or so-called number is complete in itself, and save outwardly indicates no relation with prior or subsequent numbers, issues or publications; and that the only connection of the successive issues one with another is that each bears the title "Work
26 and Win," and the issues as they appear are numbered consecutively; all of which will appear by an examination of the copies of the publication filed with the said bill and with this answer as a part hereof, marked Exhibits, A, B, C, D, and E.

This defendant denies that said books are originated and published for the dissemination of information of a public character; and while it may be true that each of said books may be a work of literature itself, the defendant denies that the said books or any of them are devoted to literature in any proper or legal sense, or within the meaning of the Act of March 3, 1879. For aught that this defendant knows to the contrary, none of the said books so issued was or is designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates.

This defendant does not know of his own knowledge, and therefore can neither admit nor deny that the said "Work and Win" has a legitimate list of subscribers; but if this fact be competent for inquiry by this court, and be material, demands strict proof of the same. This defendant is informed and believes and avers, that none of the said several books or novels published under that designation are sent through the mails to individuals who subscribe for them for any period of time, but that all, or pratically all, of the copies of each of said books or novels so published are by the complainant, either directly or through agents, distributed to news agents or news dealers, who in turn sell them as books, singly and without relation to the other books or novels likewise published under the same designation. And this defendant says that by reason
27 of the manifest character of these publications as books, and not as successive parts of a continuous periodical, neither he nor his predecessors was ever called upon officially to inquire and determine whether or not the alleged periodical known as "Work and Win" had a legitimate list of subscribers; and he further submits that if the supposed right of complainant to transmit books published under the designation "Work and Win" is in any wise dependent upon the existence of a legitimate list of subscribers, the question of the extent of such list is one of fact, for the cognizance of the Postmaster General.

Further answering the allegations contained in paragraph five, this defendant denies that the publication designated "Work and Win" has complied or is complying with all the terms, conditions and requirements of the laws of the United States relating to mailable matter of the second class, and denies that said publication is matter of the second class as alleged.

VI–VII.

This defendant is informed and believes, that the allegations of paragraphs six and seven are true, with the exception of the allegation that the acts of this defendant were wrongful; and this he denies and says that he is informed and believes that said acts were lawful and just, and wholly within his authority and jurisdiction.

VIII.

This defendant is not informed as of his own knowledge of the conditions and circumstances surrounding the passage of the
28 Act of March 3, 1879, and can neither admit nor deny the allegation that publications similar to "Work and Win" were as alleged, regularly admitted, received and transmitted through the mails of the United States as periodical publications and mailable matter of the second class prior to said act; but this defendant denies that such publications have been at any time heretofore, or now are, by all publishers, news dealers and agents, as well as by the public in general, deemed, held, and regarded to be periodical publications and were ordinarily and usually spoken of and treated as such; and denies that it was in the light of such alleged universal recognition of the periodical character of such publications and of their rights to transmission at periodical rates in common with other periodical publications that the Act of Congress of March 3, 1879, was enacted; and denies that the definitions and conditions mentioned in said Act were expressly intended and designed to include and embrace publications of the character of "Work and Win."

This defendant submits that said Act was not intended, and the definitions and conditions mentioned therein were not intended and designed, either expressly or otherwise, to include and embrace publications of the character of that in respect of which this complainant has been excluded from the second class mailing privilege, to-wit: the publication entitled "Work and Win," but that said Act had in contemplation publications such as are commonly known as newspapers and magazines, published periodically—that is to say, at regular intervals, either daily, weekly, monthly or quarterly, for the dissemination of news and other information of instruc-
29 tive or educational value, or devoted to literature, or to the arts, sciences, or special industries; and that the circulation of publications of the class of "Work and Win," which have the characteristics of books and by section seventeen of said Act are designated as mailable matter of the third class, which, moreover, are not "devoted to literature," and if literature themselves are of an inferior order thereof, was not designed or intended to be encouraged by the extension to them of the special privileges authorized by sections 7, 10, 12 and 14 of said Act.

IX.

This defendant can neither admit nor deny the allegation that the Post Office Department did from and after the passage of said Act of March 3, 1879, admit, recognize, treat and transmit publica-

tions in all respects identical with the publication of complainant, but denies that such course, if pursued by said Department as alleged, was in recognition of any universal understanding of the terms "periodical publications," or of any universal understanding of the true intent and meaning of said Act. This defendant is informed, and so believing avers, that very many publications similar in their general characteristics to the publication of complainant were received and transmitted in the mails by the Post Office Department as matter of the second class prior to November, 1901, but that such classification and treatment of such publications were quite generally criticised as an abuse of the privileges accorded to periodical publications by said Act, and contrary to its true intent and purpose; and says that since said time very many such
30 publications have been excluded from the second class of mail matter, and none such has been entered as matter of said class. This defendant is further informed, and so believing avers, that such publications were received and transmitted as matter of the second class under mistake by said Department both of law and fact, and he is in no wise bound thereby.

This defendant denies that the publication of the complainant was on the 27th day of July, 1907, unlawfully and wrongfully excluded from the second class of mail matter, and avers on the contrary that the order of said date excluding said publication from the mails as matter of the second class was lawfully and regularly issued in due course and after hearing given to the complainant.

X.

This defendant denies that the publications referred to by complainant as "The Black Cat" and the "All-Story Magazine" are similar in respect of all the conditions established by the said Act of March 3, 1879, to the publication of complainant and not to be distinguished therefrom; and he denies also that the exclusion of said publication from the second class of mail matter constitutes a discrimination against said publication or a denial of justice to the complainant, or a violation of the fundamental principle that the laws of the United States must be applied with equality to all its citizens, and that by said exclusion the complainant is deprived of the equal protection of the laws. This defendant avers on
31 the contrary that the exclusion of the said publication was in conformity with the established policy of the Post Office Department, designed to carry out the provisions of the Act of March 3, 1879; and that in pursuance of said act and policy, no publication possessing the characteristics of books may be received as matter of the second class and so transmitted in the mails, but that all such publications shall be classified according to their substance and real character and admitted to the mails for transmission as matter of the third class in pursuance of section 17 of said Act, and all such publications are being excluded from the second class of mail matter in the usual course as they come to the attention of the Post Office Department.

XI.

This defendant admits the allegations of paragraph eleven, except as to the statement that "by said notice complainants were informed that their 'answer in writing must be submitted on or before June 11, 1907,'" and this he denies, and avers that said hearing was fixed for Wednesday, June 12, 1907.

XII.

This defendant is advised and so believing avers that on June 11, 1907, counsel for complainant, to wit, W. H. Heines, Esq., appeared at the office of the Third Assistant Postmaster General and stated to his secretary that he desired to see that officer in reference to the publication of complainant which had been excluded from the second class of mail matter; that counsel was informed by said secretary that the Third Assistant Postmaster General was
32 engaged, or was not at that moment in his office; that counsel left with the statement that he would call the next following day; that on the next day, to wit, June 12, he called again at the office of the Third Assistant Postmaster General, and his said secretary, on going to the room of that officer, found him engaged in a conference; that on being informed that counsel representing complainant in the matter of the exclusion of its said publication had called and desired to see him, the Third Assistant Postmaster General directed his secretary to invite counsel to call on the Superintendent of the Division of Classification and to instruct said Superintendent to go over with him any matter that he desired to discuss with reference to said publication, note his appearance in response to the citation issued on May 15, 1907, to complainant to show cause why its said publication should not be denied transmission in the mails as matter of the second class, and that if after conferring with said Superintendent counsel desired to see the Third Assistant Postmaster General personally, the latter would see him; that this defendant is informed and believes that said secretary fully carried out these instructions; that counsel submitted to said Superintendent in answer to said citation a printed statement and argument on behalf of the complainant, to a copy of which printed statement and argument annexed as "Exhibit F" this defendant craves leave to refer as showing that it is responsive to said citation and undertakes to answer the charge of the Third Assistant Postmaster General that the publication of complainant in question, to wit,
"Work and Win" was not a periodical publication as designated
33 and defined by the Act of March 3, 1879, but that the respective numbers thereof were in fact books. This defendant is further informed and believes that said Superintendent of the Division of Classification later advised the said secretary of the Third Assistant Postmaster General by telephone that counsel for complainant had called and he had noted his appearance; and that at the same time said Superintendent inquired whether the Third Assistant Postmaster General desired to see counsel; that said secretary replied that he did not unless counsel desired to see him as he had nothing special to say to him; and that the said Superintendent

replied that counsel for the complainant did not have anything further which he desired to communicate to the Third Assistant Postmaster General. This defendant is advised and so believing avers that it was and is the understanding of the Third Assistant Postmaster General and of the Superintendent of the Division of Classification, that counsel for the complainant desired the printed argument submitted on behalf of the complainant to be taken as its answer to the citation issued by the Third Assistant Postmaster General, and that counsel did not desire to be heard orally in respect of said citation, but had included in the said printed argument the full reply of complainant in the premises.

This defendant avers that by the regulations of the Post Office Department (Edition of 1902), section 19, paragraph 8, said Superintendent of Classification "is charged with the consideration of all questions relating to the classification of matter admissible to the mails, including the determination of the admissibility of
34 publications to the second class of mail matter and their right to continue therein," and that the duties so assigned to him by necessary implication include general authority to hold hearings of the character required by the Act of 1901; and is advised and believes that said Superintendent was moreover specifically instructed by direction of the Third Assistant Postmaster General to hear counsel for the complainant in response to said citation in respect of "Work and Win," and that in pursuance of said instruction received the printed statement and argument prepared in answer to said citation, and offered to receive and did receive all other papers and matters submitted by counsel in its behalf, and offered to hear counsel at length orally if desired. But this defendant is further advised and believes that the Third Assistant Postmaster General was ready and willing nevertheless to hear counsel orally and fully on the day fixed in said citation, to wit, the 12th day of June, 1907, and that counsel had full opportunity to be so heard on said day had he so desired.

XIII.

This defendant is informed and believes that before the issuance of the order excluding said publication of the complainant from the second class of mail matter, full opportunity was given complainant and its counsel to be heard, and that there was in fact a hearing in respect of said matter, conforming in all respects with the intent and purpose of the Act of March 3, 1901 (31 Stats. L. 1107).

This defendant is further informed and so believes and
35 avers that the privilege of having publications complying with the conditions of second class matter as defined in the Act of March 3, 1879, transmitted at the second class rate of postage is not a property right; and that whether publications do so comply with such conditions is a matter wholly within the competence and jurisdiction of the Postmaster General, and its determination is within the judgment and discretion of the Postmaster General for the time being; and is further advised, and so believing avers, that there was in the case of this publication, no deprivation of property of the complainant.

XIV.

This defendant admits the allegations of paragraph fourteen, and says that it was his duty to examine into all the facts and circumstances which determine whether the publication of complainant complies with the statutory conditions for acceptance at the second class postage rates, and as the result of the inquiry into such facts and circumstances on and after hearing to complainant as aforesaid, this defendant, acting through the Third Assistant Postmaster General, has found said publication not to be entitled to admission to the mails at the second class rate; and says that it is his intention in pursuance of such finding and unless restrained by this court, hereafter to decline to receive said publication for transmission in the mails at said rate of postage.

XV.

36 This defendant is informed and believes that the question whether the publication of complainant designated "Work and Win" is a periodical publication within the meaning of the law and so entitled to transmission as second class matter, is a mixed question of law and fact to be determined upon a comparison of the said publication itself with the conditons set out in said Act of March 3, 1879, and consideration of all the facts and circumstances surrounding its publication. This defendant is informed and believes that the decision of the Third Assistant Postmaster General that the issues of the said publication do not constitute periodical publications as required by Sections 7, 10, 12 and 14 of the Act of March 3, 1879, is not an error of law as alleged, but is the correct and true finding upon the law and facts. This defendant denies that said decision of the Third Assistant Postmaster General is simply an arbitrary, capricious and unlawful conclusion, imposing upon the right to transmit matter of the second class unspecified and undefined requirements in excess of and in addition to those established by the statutes of the United States and unauthorized by the statute under which he assumed to act and wholly beyond his power and jurisdiction; and avers on the contrary that said decision is the just and proper conclusion upon the law and facts, reached in a fair, open and judicial manner and with due regard to all the rights and privileges of the complainant, and fully authorized by the statutes of the United States defining mail matter of the second class and regulating its transmission.

37 This defendant is further informed and so believing avers, that in deciding the question whether the publication of complainant is a periodical publication within the meaning of the law, the Third Assistant Postmaster General considered not only copies of successive numbers of the publication by comparison with the requirements of the Act of March 3, 1879, but also all other evidence and facts material to such inquiry.

This defendant is further advised, and so believing avers, that the Third Assistant Postmaster General, after careful inquiry into the law and facts bearing upon the question whether the said publication of complainant is a periodical publication as defined by the

Act of March 3, 1879, and before taking action upon the conclusion which he had reached in respect of said question, to assure himself of the correctness of such conclusion and that it was just and in accordance with law, requested and received the opinion of the Assistant Attorney General for the Post Office Department upon the matter, the same being the opinion to which the complainant refers in his said bill; and further avers that the action of the Third Assistant Postmaster General in excluding "Work and Win" from the second class of mail matter was not taken arbitrarily or capriciously but upon deliberate and careful consideration of the whole subject.

This defendant is informed and believes that his action in excluding said publication from the privileges of transmission in the mails at the second class postage rates is not contrary to the practice of his predecessors in office, but is in full accord and harmony with the practice established on or about November, 1901, by his predecessor, Postmaster General Smith, and uniformly pursued since that time, and avers further that a large number of publica-
38 tions similar to "Work and Win" have been denied the second class mailing privilege since said time, to-wit, November, 1901, among which were "Arrow Library," "Medical Library," "Log Cabin Library," "Eagle Series," "Broad Brim Weekly" and other books published by Messrs. Street and Smith; "Beadle's Half-Dime Library," "Beadle's Boys' Library" and "The Dime Library," published by M. J. Ivers & Company; "Modern Library" published by the Modern Stories Publishing Company; "The Family Library" published by The Family Library Company; "The Arm-Chair Library" and "The Leisure Hour Library" published by F. M. Lupton; all of New York City, to copies of which publications annexed hereto as Exhibit G this defendant refers and prays that same be taken as a part hereof.

This defendant is further informed and believes that the admission and transmission of mailable matter under the terms prescribed by the statutes of the United States is a continuous administrative act, the performance of which is devolved by law upon this defendant, and that in performance of this duty this defendant is in no wise bound or controlled by the action of his predecessors in office, nor does the admission and transmission by one Postmaster General of mailable matter of a certain kind as of the second or any other class constitute any obligation, contractual or otherwise, upon the United States or its officers thereafter to admit similar publications under the same name as of the same class and at the same rate of postage.

This defendant is informed and believes that said decision is not a mistake of law, but on the contrary is in full accordance
39 with law and justified and demanded by the law and facts in respect of which it was pronounced.

XVI.

This defendant is informed and believes that the allegations of paragraph sixteen are true.

XVII.

For answer to paragraph seventeen, this defendant denies that the publication of complainant is a periodical publication, and denies that it complies with the conditions and requirements established by law for the admission of publications to the second class of mail matter; and further denies that the periodicity of issue of said publication is real and that the demand therefor is a periodical demand and can be met only by a periodical issue; and avers on the contrary that essentially the publication is a book and its issuance periodically is designed merely to disguise the true character of each number of the publication, which is that of a separate and independent work and in aid of the original purpose to simulate a periodical publication in order to obtain the benefit of second class rates of postage. This defendant further avers that the contents of each book or number have no relation to the contents of any other number, but are wholly independent thereof and distinct therefrom. This defendant can neither admit nor deny the allegations that if said publication is excluded from the mails it would be impossible for complainant to continue its issuance or to meet by any other form of publication the demand therefor, and submits that the same are wholly irrelevant and immaterial; but for anything this
40 defendant knows to the contrary the same may be true as stated. This defendant denies that the copies of "Work and Win" circulated by mail are practically all current copies and not back numbers, and denies that the only back numbers so transmitted are a minute fraction of the total issue and not in excess of the usual demand for back numbers of periodicals; and avers on the contrary that a very considerable proportion of copies of said publication circulated by mail are back numbers, and further avers and says that the proportion of back numbers so transmitted is much in excess of that of genuine and real periodicals; and this defendant refers to prominent advertisements of back numbers appearing in each number of "Work and Win," annexed as Exhibits A, B, C, D, and E, and prayed to be taken as a part hereof, as tending to show that complainant circulates back numbers of said publication very largely by mail.

This defendant denies the allegation of paragraph seventeen that if the second class mailing privilege is taken away from the said publication, complainant will be unable to send the same to various parts of the United States where the only possible means of communication is through the mails of the United States, and that such exclusion from the mails will amount to an absolute prohibition and interdict upon the distribution and circulation of said publication, and avers on the contrary that the only effect of the exclusion of said publication from the second class mailing privilege will be to require the payment of postage upon copies thereof at the third class rate instead of the second class rate.

As to the allegation of paragraph seventeen that Work and Win has a legitimate list of subscribers, this defendant refers to
41 his answer to the same allegation as contained in paragraph five of said bill.

XVIII.

This defendant denies each and every one of the allegations of paragraph eighteen; and avers and says on the contrary that said publication is not "devoted to literature;" that it implies no continuity of literary character and no connection of successive issues one with another, but that each number of such publication is complete within itself and indicates no relation to prior or subsequent numbers; and this defendant further avers that the contents of said publication, while not impure in the sense of being indecent or immoral, are nevertheless unwholesome and positively harmful in their influence upon the class of readers to which it is addressed almost exclusively, to-wit, boys of tender age and immature minds, who receive therefrom false impressions of the duties of life, are filled with the desire of adventure and become restive and discontented under the restrictions and discipline properly imposed upon them by parents or others to whom they should naturally give obedience and look for guidance.

XIX.

This defendant denies that the order of the Third Assistant Postmaster General excluding "Work and Win" from the second class mailing privilege is invalid, and avers on the contrary that said order is fully warranted and valid in law. This defendant is unable to admit or deny the allegation that if said order is put into
42 execution by the postmaster at New York the complainant will not only be compelled to suspend the issuance of its publication but its machinery and appliances necessary to produce the same will become wholly useless and complainant be deprived of their value, which is in excess of the sum of $5,000.00; but submits that said allegation is wholly irrelevant and immaterial. If however, this court should hold that said allegation is in any wise material to the issues in this cause, this defendant demands strict proof thereof.

XX.

This defendant is informed and so believing avers that the transmission of matter in the mails at the second class postage rates is in pursuance of a mere privilege conferred by statute upon publications meeting the statutory requisites and conditions, and is not a right of property as alleged by the complainant; and that the exclusion of the publication of complainant from the second class mailing privilege for the reason that it does not comply with such requisites and conditions neither deprives the complainant of any property or right of property, nor any right conferred upon it by the statutes or constitution of the United States.

This defendant can neither admit nor deny the allegation that the privilege of transmitting "Work and Win" in the mails at the second class postage rates exceeds in value to the complainant the sum of $5,000.00 irrespective of the value of the machinery and appliances used in its publication; but submits that said allegation

is wholly irrelevant and immaterial to the issues in this cause.
43 If however this court should hold said allegation to be in any wise material to said issues, this defendant demands strict proof thereof.

Answering generally to the whole bill, this defendant says that as Postmaster General of the United States, he is charged by law with the duty of superintending generally the business of the Post Office Department and administering all laws relating to the postal service; that among his duties is that of classifying the mail matter offered for transmission through the mails of the United States and distributing the same into the respective classes created and designated by Congress; in the course of which classification it devolves upon him to investigate and ascertain whether matter transmitted as of the second class does or not comply with the conditions which by law are prescribed for matter of such class; that such investigation exercised by him as the head of an Executive Department in the ordinary discharge of his duty, requires an inquiry into the facts and an examination of the evidence and an interpretation of the law, and that in the case of the publication hereinbefore mentioned, after due notice to the complainant and a full, fair and impartial hearing and an examination into facts and evidence relevant and material to the inquiry, and a construction of the law and its application to the facts in evidence, this defendant found and determined that "Work and Win," published by the complainant, does not have the characteristics prescribed by statute for matter of the second class, but on the contrary possesses the characteristics of third class matter, and, not fulfilling the conditions established by law for matter of the second class, was not entitled to admission to the
44 mails at the second class postage rate, and that the certificate admitting such publication as matter of the second class should for that reason be revoked and become inoperative in the future; which said finding, determination and decision involved the exercise of judgment and discretion on the part of this defendant and of the Third Assistant Postmaster General, acting in that behalf, and for that reason as this defendant respectfully submits, is not subject to be reviewed by this honorable court.

And this defendant further submits that the complainant in and by its said bill and the matters and things set forth therein does not make or state such a case as would entitle it to the relief thereby prayed, and as to so much of the said bill as prays an injunction against the enforcement by this defendant of his decision that the said publication is not entitled to transmission at the second class rates, this defendant submits that it is against the course and practice and not within the jurisdiction of this court to interfere with, review or afford relief against the decision and action of the head of an Executive Department in a matter involving the exercise of his judgment and discretion; and submits that the publication of said complainant is of such a character as to work moral harm and injury to those into whose hands issues thereof are destined to fall, and whose minds are open and receptive to such improper influences,

and that it is not such as should have the aid or assistance of a court of equity in continuing the exercise of a privilege intended to make possible the widest and freest dissemination of information
45 of general interest or instructive or educational value; and this defendant hopes he will have the same benefit of these defences as if he had formally demurred to the said bill upon the ground thereof.

Having fully answered, this defendant prays to be hence dismissed with his reasonable costs.

G. v. L. MEYER,
Postmaster General.

DANIEL W. BAKER,
U. S. Att'y.
RICHARD W. WEBSTER,
Special Counsel.

DISTRICT OF COLUMBIA, *ss:*

George v. L. Meyer Postmaster General, being first duly sworn, deposes and says that he has read the foregoing answer by him subscribed and knows the contents thereof and the matters and things therein set forth he knows to be true, save those stated upon information and belief, which he believes to be true.

G. v. L. MEYER,
Postmaster General.

Subscribed and sworn to before me on this second day of November, A. D. 1907.

[SEAL.] GEORGE G. THOMSON,
Notary Public.

My commission expires March 14, 1911.

46 *Joinder of Issue.*

Filed December 3, 1907.

In the Supreme Court of the District of Columbia.

Equity. No. 27280.

FRANK TOUSEY, Publisher, a Corporation,
v.
GEORGE VON L. MEYER, Postmaster General of the United States.

Now comes the Complainant in the above entitled cause and joins issue on the answer of the Defendant filed herein.

HENRY H. GLASSIE,
J. J. DARLINGTON,
Solicitors for Complainant.

47 *Order Substituting Frank H. Hitchcock as Defendant.*

Filed May 4, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 27280.

FRANK TOUSEY, Publisher, a Corporation, Complainant,
vs.
GEORGE VON L. MEYER, Postmaster General of the United States, Defendant.

Upon consideration of the retirement from office of Postmaster General of George von L. Meyer and the motion that his successor Frank H. Hitchcock be substituted as defendant, it is this fourth day of May, 1909, by the court ordered:

That Frank H. Hitchcock, Postmaster General of the United States, be and he is hereby substituted as defendant in this cause, and that the same be maintained against him as the successor in office of the said George von L. Meyer.

WRIGHT, *Justice.*

48 *Final Decree.*

Filed June 11, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 27280.

FRANK TOUSEY, Publisher, a Corporation,
v.
FRANK H. HITCHCOCK, Postmaster General of the United States.

This cause came on to be heard upon the pleadings and evidence, and was argued by counsel for the respective parties and considered by the Court: whereupon the court finds that the order of July 26th, 1907, recited in the bill was issued without a hearing, such as provided for by law; whereupon it is this 11th day of June, 1909, by the Court ordered, adjudged and decreed that the defendant, Frank H. Hitchcock, Postmaster General, his agents and subordinates, be and they hereby are enjoined from enforcing the order of July 26th, 1907, revoking the authority granted for acceptance of the Work and Win, a weekly, for mailing at the second class rates of postage; and from refusing to receive the issues of said publication and to transmit the same through the mails of the United States as mailable matter of the second class. None of the other issues raised by the pleadings are determined.

WRIGHT, *Justice.*

From the above decree the defendant in open court herewith prays an appeal to the Court of Appeals which is hereby allowed.

THOS. H. ANDERSON, *Justice.*

Suggestion of Interest of the United States.

Filed June 11, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 27280.

FRANK TOUSEY, Publisher, a Corporation, Complainant,
vs.
FRANK H. HITCHCOCK, Postmaster General of the United States, Defendant.

Now comes the Attorney of the United States in and for the District of Columbia, and suggests to the Court that it appears by the pleadings and record herein that suit is brought against the defendant, the Postmaster General of the United States, in his official capacity as an officer of the United States, and that the said suit is one solely against the said United States, its interests and its properties, and that the said defendant is not sued in his personal capacity, and that he has no personal interest or concern therein.

And the said Attorney of the United States in and for the District of Columbia hereby makes due suggestion to the Court that the appeal prayed and taken herein from the decree of the Court entered herein on the eleventh day of June, A. D. 1909, was taken by direction of the Attorney General of the United States, and that the said case, and the said appeal, are to be treated in all respects as an United States case.

DANIEL W. BAKER,
Attorney of the United States in and for the District of Columbia.

Suggestion of Interest of U. S. as to Taking Appeal.

Filed June 11, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 27280.

FRANK TOUSEY, Publisher, a Corporation, Complainant,
vs.
FRANK H. HITCHCOCK, Postmaster General of the United States, Defendant.

The Clerk of the Court will please take notice that the appeal prayed and taken herein on the eleventh day of June, A. D. 1909,

from the decree of the Supreme Court of the District of Columbia issuing an injunction, entered the eleventh day of June, A. D. 1909, by the defendant, is taken by direction of the Attorney General of the United States and by the Postmaster General of the United States, and is to be treated in all respects as an United States case.

DANIEL W. BAKER,
Attorney of the United States in and for the District of Columbia.

51 *Directions to Clerk for Preparation of Transcript of Record.*

Filed June 23, 1909.

In the Supreme Court of the District of Columbia.

No. 27280. In Equity.

FRANK TOUSEY, Publisher, a Corporation, Complainant,
vs.
FRANK H. HITCHCOCK, Postmaster General of the United States, Defendant.

The following pleadings and papers are hereby designated by counsel for defendant as the record to be made and filed in the Court of Appeals for the District of Columbia, in the appeal prayed and taken herein from the judgment of the Supreme Court of the District of Columbia, on the tenth day of June, A. D. 1909, granting the injunction prayed for in the bill.

1. The bill of complaint, with exhibits.
2. The rule to show cause.
3. The restraining order.
4. The answer of defendant, with exhibits.
5. Replication.
6. Testimony.
7. Order substituting Frank H. Hitchcock, vice Meyer, Postmaster-General, resigned.
8. Decree.
9. The suggestion of the interest of the United States in

52 the suit.

10. The notice to the Clerk that the appeal was taken by the direction of the heads of Departments of the United States, and is, and is to be treated as, an United States case.
11. And this order.

DANIEL W. BAKER,
Solicitor for Defendant.

Further Directions for Making up Record on Appeal.

Filed July 2, 1909.

In the Supreme Court of the District of Columbia.

No. 27280. In Equity.

FRANK TOUSEY, Publisher, a Corporation, Complainant,
vs.
FRANK H. HITCHCOCK, Postmaster General of the United States, Defendant.

In addition to the pleadings and papers designated by counsel for the defendant, the clerk will please include, in the record to be made up and filed in the Court of Appeals, the following:

1. Evidence offered in the cause of Ormond G. Smith, et al., vs. Frank H. Hitchcock, Postmaster General, in Equity No. 27279 as per stipulation in this cause.

53 2. And this order.

J. J. DARLINGTON.
H. H. GLASSIE.
Solicitors for Complainant.

Memorandum.

July 14, 1909.—Time in which to file Transcript of Record in Court of Appeals is hereby extended to, and including, the tenth day of September, A. D. 1909.

Stipulation.

Filed August 12, 1909.

In the Supreme Court of the District of Columbia.

No. 27280. Equity.

FRANK TOUSEY, Publisher, a Corporation, Complainant,
vs.
FRANK H. HITCHCOCK, Postmaster General, Defendant.

It is, this 6th day of August, A. D. 1909, hereby stipulated by and between the parties to the above cause, by their respective solicitors, subject to the approval of the Court of Appeals, that, from the transcript of the record for appeal to the said Court of Appeals,

54 all the exhibits may be omitted, with the right to any party to produce and use the originals thereof at the hearing in said Court of Appeals, with like effect as if the same were included in the transcript of the record filed in that Court and in the printed

copies thereof required by the rules, the printing thereof being dispensed with, and that the same procedure shall obtain in the case of any appeal in this cause to the Supreme Court of the United States, subject to the approval of that Court. It is further stipulated that the transcript of the record and exhibits in the case of Ormond G. Smith et al. vs. Frank H. Hitchcock, Postmaster General, Equity No. 27,279, shall be considered as a part of the record in this cause, for all purposes of appeal in this cause.

H. H. GLASSIE,
J. J. DARLINGTON,
Solicitors for Complainant.
DANIEL W. BAKER,
Solicitor for Defendant.

55 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 54, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in Equity Cause No. 27280, wherein Frank Tousey, Publisher, a corporation, is Complainant and Frank H. Hitchcock, Postmaster-General of the United States, is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 10th day of September, A. D. 1909.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2060. Frank H. Hitchcock, &c., appellant, vs. Frank Tousey, &c. Court of Appeals, District of Columbia. Filed Sep. 10, 1909. Henry W. Hodges, clerk.

IN THE Henry W. Hodges, Clerk.

Court of Appeals, District of Columbia.

OCTOBER TERM, 1909.

No. 2059.

FRANK H. HITCHCOCK, POSTMASTER-GENERAL OF THE UNITED STATES, APPELLANT,

vs.

ORMOND G. SMITH, GEORGE C. SMITH, AND CORA A. GOULD, TRADING UNDER THE FIRM NAME OF STREET & SMITH, APPELLEES.

No. 2060.

FRANK H. HITCHCOCK, POSTMASTER-GENERAL OF THE UNITED STATES, APPELLANT,

vs.

FRANK TOUSEY, PUBLISHER, A CORPORATION, APPELLEE.

BRIEF FOR APPELLANT.

DANIEL W. BAKER,
United States Attorney in and for the District of Columbia.

F. SPRIGG PERRY,
Assistant United States Attorney in and for the District of Columbia.

JAMES J. BRITT,
Special Counsel for the Post Office Department.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C.

IN THE

Court of Appeals, District of Columbia.

OCTOBER TERM, 1909.

No. 2059.

FRANK H. HITCHCOCK, POSTMASTER-GENERAL OF THE UNITED STATES, APPELLANT,

vs.

ORMOND G. SMITH, GEORGE C. SMITH, AND CORA A. GOULD, TRADING UNDER THE FIRM NAME OF STREET & SMITH, APPELLEES.

No. 2060.

FRANK H. HITCHCOCK, POSTMASTER-GENERAL OF THE UNITED STATES, APPELLANT,

vs.

FRANK TOUSEY, PUBLISHER, A CORPORATION, APPELLEE.

BRIEF FOR APPELLANT.

These are two appeals from decrees of the Supreme Court of the District of Columbia, and involve questions so similar that in the court below it was stipulated that the evidence taken in one case should be used at the hearing in the other.

The final decree in each case was signed at the same time, and was based upon the same evidence and arguments.

Statement of the Case.

On August 8, 1907, there was filed in the Supreme Court of the District of Columbia two bills in equity praying for an injunction against the Postmaster-General of the United States. One of these was on behalf of Ormond G. Smith, George C. Smith, and Cora A. Gould, trading under the firm name of Street & Smith, with reference to a publication known as "Tip Top Weekly." The other bill was filed on behalf of Frank Tousey, Publisher, a corporation, with reference to a publication known as "Work and Win." The two bills set out that the Post Office Department had admitted these publications in the mails as second-class mail matter for a long period of time. That "Tip Top Weekly" was admitted as second-class mail matter on March 1, 1897, and "Work and Win" was admitted as second-class mail matter on December 8, 1898. That on May 17, 1907, a citation was issued from the Post Office Department, office of the Third Assistant Postmaster-General, citing the publishers of these two works to appear before the Third Assistant Postmaster-General and show cause on a day named why the second-class rates of postage should not be revoked. That on July 26, 1907, the Post Office Department issued an order that these two works should be required to pay postage at the third-class rate, and their certificate of entry as second-class matter was revoked.

It was stated in each of these bills that the publishers had not had a hearing in accordance with the act of Congress approved March 3, 1901, and that the "Tip Top Weekly" and "Work and Win" were not such works as fell within the third-class of mail matter under the act of March 3, 1879.

A rule to show cause against the Postmaster-General was issued on August 8, 1907, and after a hearing a preliminary

restraining order was filed on August 12, 1907, in which the Postmaster-General was restrained and enjoined until final hearing from revoking the certificate of entry of these two works as second-class mail matter, and he was required to accept them at the second-class rate of postage. Upon final hearing this preliminary injunction was made permanent and from this final order the Postmaster-General appeals.

An answer was filed by the Postmaster-General denying in detail the allegations of the bills, and issue was joined thereon. A number of witnesses were examined on both sides.

On December 7, 1907, Ormond G. Smith was examined on behalf of the plaintiff in the court below (R., 25). Witness testified that he was a member of the firm of Street & Smith, and that the firm had been in existence in the business of publishers for about 55 years. This firm publishes the "Tip Top Weekly," and have been publishing it for about twelve years. During this period the publication has been passing through the mails as second-class mail matter. The publication is regularly issued every week on a given day, bears date of issue and is numbered consecutively. It is issued from the known office of the firm at Fifteenth Street and Seventh Avenue, New York city. The publication is formed of printed paper sheets with an unsubstantial binding; has a list of subscribers. The general nature of its contents relates to college stories, and stories of athletics almost exclusively. The stories concern themselves with the doings of one set of characters; that is, the protagonist of the story goes through the entire series and new characters are added from time to time. The publication is generally intended for young people. The authorship of the stories is usually the same. The stories started in school where the hero came to pursue his studies, and carry the boy through school and college, dealing principally with base-ball and foot-ball contests. This boy has numerous adven-

tures, and after he is graduated some relative of his attends the school and the rest of the narratives concern this relative. The character in the "Tip Top Weekly," is Frank Merriwell.

This firm also publishes other weekly juvenile stories, namely "Brave and Bold," "Buffalo Bill Weekly," "Nick Carter Weekly," and "Diamond Dick Weekly," all of which were excluded by the order which excluded "Tip Top Weekly" (R., 28).

The edition is 105,000 copies weekly, and these are distributed to the readers through the American News Company, as distributing agents. The offices of the News Company in the various States have the lists of customers and make deliveries to these customers. The dealer pays the firm of Street & Smith 3½ cents per copy and the publication is returnable, if not sold, at 3 cents per copy at the dealer's expense, so that the dealer loses ½ cent on each copy he fails to sell. The copies of the publication are sold single, in the sense that they are issued weekly and disappear from the newsstands in that week (R., 30). They are not generally sold after the expiration of the week during which they are published. The firm has a subscription list of 2,500 persons to whom these publications are sent direct.

Under objection, the witness testified that the ratio which individual subscribers to periodical magazines bear to the general circulation of such publications was less than ten per cent among the trade generally. The firm has an establishment worth about $1,800,000.00, exclusive of goodwill. Value of their building, which is used for publishing exclusively, is $600,000.00 (R., 32).

Thereupon witness produced copies of a number of magazines such as the "New York Weekly," "Young's Magazine," and others, and they were offered in evidence under objection, for the purpose of showing that they were similar to the publications involved in the present suit and had been

accorded second-class mail privileges for a number of years by the Post Office Department.

Witness then testified, under objection, to the financial loss which the firm of Street & Smith would suffer in case their publication were denied the second-class mail privileges (R., 35). Mr. Heines, general manager, was designated to represent the firm at Washington in the matter of the order of exclusion (R., 36).

Upon cross-examination (R., 36) witness testified that "Tip Top Weekly" was sold on the stands at 5 cents a copy, and that the price to subscribers was $2.50 a year. Publication goes through all the news trade channels, and the American News Company distributes all the copies of the magazine except the individual list of 2,500.

The two heroes in these stories are Frank Merriwell and his younger brother Dick Merriwell, and the stories deal with the lives and adventures of college boys and with school athletics. "Frank Merriwell's Bluff, or, The Lost Senorita of Senora" is the adventure of a boy during vacation. Such also is the story entitled "Dick Merriwell's Skill, or, The Prince of the Pistol," also, "Dick Merriwell, Lion Tamer, or, Ata, Queen of the Air," also "Frank Merriwell in Arizona, or The Mysteries of the Mine," and other publications with like names (R., 38). In none of these stories is the hero pictured as a boy bandit or pirate.

The publications contain 32 pages in each issue, and are usually written by Gilbert Patten, whose pen name is Burt L. Standish. The other publications heretofore mentioned as being issued by Street & Smith are of like tenor with the "Tip Top Weekly." These four publications appear each week, deal with adventure, and are distributed by the American News Company.

The current number of the "Tip Top Weekly" is something over 500, and some old issues have been republished in book form in the "Medal Library."

Upon redirect examination (R., 41) witness testified that

the moral tone of the publications was good and that vice was punished and virtue rewarded in all of the stories, and that no word or phrase was admitted in the stories that could possibly give offense to any one. The publishers have received thousands of letters commending the publications. The sale of back numbers of the publication is trifling. The book form in which these stories are reissued is of a different size and form from the weekly publication.

Witness further testified that he did not think that the effect of the stories, relating as they did to marvellous adventures and feats, was such as to excite a feeling of unrest or desire for adventure on the part of young boys.

A certificate of entry of the "Tip Top Weekly" as second-class mail matter, dated March 1, 1897, in the post-office at New York, N. Y., was offered in evidence (R., 45).

Mr. William H. Heines testified (R., 46) that he was employed by Street & Smith, and was designated by that firm to appear in Washington in response to the rule to show cause issued by the Post Office Department. He came to Washington on June 9th, which was Sunday. On June 10th he went to the office of the Third Assistant Postmaster-General, and saw a clerk in the outer office. He handed the clerk two copies of the response to the citation of the Post Office Department, one for the firm of Street & Smith, and one for the firm of Frank Tousey Publishing Company, and told the clerk that he represented each of these firms. Witness said he would call the next day by appointment at two o'clock. He did not see the Third Assistant Postmaster-General on June 10th. On June 11th he called at two o'clock and told the messenger he had an appointment with the Third Assistant Postmaster-General. A clerk in the office of the Third Assistant Postmaster-General said to him that the gentleman whom he wished to see was down stairs. Witness went down stairs and was introduced to Mr. Bacon, Superintendent of the Classification Division. Witness asked Mr. Bacon if he had anything to say to him. Mr.

Bacon said "no" (R., 48). Mr. Bacon said he had received the documents witness had left the day before, and had read them. Witness asked Mr. Bacon if he had anything to ask him and Mr. Bacon replied that he had not. Witness then went upstairs and asked to see the Third Assistant Postmaster-General, but was unable to do so. He then returned to Mr. Bacon and requested to be put on record as having called (R., 48). During these interviews in the office of the Third Assistant Postmaster-General, and in the office of the Superintendent of Classification, no statement was made to witness of any charge or accusation against "Tip Top Weekly," nor was there any statement made with respect to the grounds upon which the exclusion of the periodical might be urged. An objection was made to this last statement, as the grounds for the charge were specified in the citation of the department. No evidence was stated to the witness in support of the allegation contained in the rule to show cause that publications in question were in fact books. The witness returned to New York on the afternoon of June 11th. Witness thereupon identified a letter from the postmaster of New York city, of June 29th, 1907, revoking the authority to mail, at the second-class rates of postage, the following papers: "New Nick Carter Weekly," "Buffalo Bill Stories," "Tip Top Weekly," and "Diamond Dick, Jr., Best Boys Weekly," and the letter of the Third Assistant Postmaster-General, which accompanied the communication of the postmaster of New York city.

On cross-examination (R., 52) witness testified that he submitted his brief a day ahead of time, namely, on June 11th. Witness testified that he was not told that he could not make a statement or argument, and that nothing was said to him on the subject at all. Witness stated that he was there to answer questions, and that he made no attempt to say anything which he did not have in his printed brief. Witness testified that he sent in word to the Third Assistant Postmaster-General that he desired to see him personally.

"I said I would like to meet the gentleman." Witness did not say that he wished to make an argument. On June 11th, at the time of the second visit to Mr. Bacon, he submitted a pamphlet containing letters commendatory of the "Tip Top Weekly," and these, the brief and the pamphlet, were all that were submitted in answer to the citation.

Orville J. Victor testified (R., 54) on behalf of the plaintiffs that he had been connected with a publishing firm in the 70's, and has had wide experience as an editor and author, and edited the "Beadle Dime Novel Series." Witness has also written histories and biographies. These dime novels contained complete stories in each issue, and were accepted by the Post Office Department for a long time as second-class mail matter. These answers were given under objection. Witness testified further that the "Lakeside Library," and publications of this character were under consideration and discussion before the Attorney-General and Congress, at the time of the passage of the act of March 3, 1879, and were considered as periodicals and entitled to pass as second-class mail matter.

James O. Spangler was introduced as a witness for the complainants, and testified (R., 63) that he was the manager of the Washington News Company, a branch of the American News Company of New York city. Witness testified that the distribution of "Tip Top Weekly" and "Work and Win" differed in no way from the distribution of other periodical literature. On cross-examination witness testified that he handled magazines, periodicals and light literature generally, as well as the daily newspapers of New York and Philadelphia. This literature, magazines, etc., is received by the Washington branch from the American News Company. About fifteen per cent of the copies of "Tip Top Weekly" and "Work and Win" are returned as unsold. Witness testified that he received copies of the literature he handled by mail and by express, as well as by freight.

Thereupon counsel for the plaintiff made a proffer of testimony, under objection, of certain reports of commissions to Congress, and of certain hearings before the postal commission, and of certain magazines and pamphlets which were passing through the mails as second-class mail matter (R., 68-84).

Sinclair Tousey (R., 85) testified for complainants that he was the president of the corporation known as the Frank Tousey Company and publishers of the publication known as "Work and Win." Witness identified the certificate of entry of publisher of "Work and Win" as second-class mail matter, of date of December 8, 1898, at the post-office at New York city. Publication has been issued regularly once a week since this period. It contains 32 printed pages, is not substantially bound, but has a paper cover. It is not bound in cloth, leather, or other substantial binding. It bears a date of issue, is numbered consecutively, and published from a known office of publication, namely 24 Union square, New York city. This publication has a small list of regular subscribers, and is not designed primarily for advertising purposes, or for free circulation. The publication is similar to "Tip Top Weekly." The name of the hero is Fred Fearnot. Witness classifies publication as high-class juvenile literature. Circulation is about forty thousand. The copies returned unsold average about twenty per cent. Publication is distributed through the American News Company exclusively, with the exception of the small subscription list. There is very little demand for this publication after the expiration of the week of issue. Capital invested in the business is nearly $200,000.00. Publication sells for five cents a copy, and the newsdealer pays the publisher 2⅜ cents per copy. Witness testified that his plant was worth about $100,000.00, and that if the order of exclusion of the Postmaster-General should stand, it would be worth nothing, except as second-hand machinery, which would possibly be about fifteen or

twenty thousand dollars. The annual net profits of the business amount to $75,000.00, and this firm publishes seven publications of the character of the one involved in the present suit. Witness identified the letter from the Assistant Postmaster-General to the postmaster at New York, dated July 26, 1907, a copy of which was received from the postmaster at New York. Mr. Heines was designated to represent the firm of Frank Tousey Company at the hearing in Washington. Upon cross-examination it was stated that the firm was not affiliated in any business with the firm of Street & Smith. Frank Tousey publication has 300 individual subscribers. The rest of the issue is handled through the American News Company. Publications of "Work and Win" include the following titles and adventures: "Fred Fearnot's Treasure Hunt; or, After the Aztec's Gold;" "Fred Fearnot and the Cowboy King; or, Evelyn and the Bad Man;" "Fred Fearnot and Roaring Bill; or, the Wickedest Boy in the West," and similar titles. On redirect examination witness stated that he had received many commendatory expressions from various persons in regard to the moral influence of his publication. This publication does not glorify vice in any form, or lawlessness; that his publications are very similar to those of Oliver Optic and Horatio Alger. On recross-examination the witness stated that he did not think that the stories in the publications excited boys into unrest, or to attempt to do things which are impossible.

Edward S. Ellis testified (R., 95) that he lived in upper Montclair, N. J., and that he was by profession and occupation an author. He has written perhaps 75 juvenile books, educational books, and a number of histories. Witness had read a number of the issues of the "Tip Top Weekly" published by Street & Smith, and they appeared to be devoted to the exploitation of manly sports, school life, and American boyhood. He found that they all taught sturdy manhood, temperance, integrity, truthfulness, and held up

the highest ideals of boyhood. From a literary standpoint, witness considered "Tip Top Weekly" a periodical. On cross-examination witness did not know of any school or Sunday-school where the "Tip Top Weekly" was kept as a reference book for the young. Witness considered the stories helpful to the young.

Edward Stratemeyer (R., 103) was called as a witness for the complainants, and testified that he resided in Newark, N. J., and is an author and literary agent. He has written about 80 books for boys, and finished up the books that Mr. Horatio Alger left unfinished at his death. Witness has read 90 numbers of "Tip Top Weekly," and considers their stories as clean, pure, up-to-date stories of boyhood life, and are fully equal to the best of the boys' books. Witness has found nothing in the issues he has read which would be detrimental to a boy's imagination, or to his moral susceptibilities, or which would tend to corrupt him in any way. On cross-examination witness testified that his pen name was Arthur M. Winfield, and that he has been engaged in writing books and stories for 25 years. Witness considers "Tip Top Weekly" similar to an ordinary magazine, that is, to weekly publications. The examinations of the issues of the publication were made within the last two or three months, with a view to this examination, and at the request of Mr. Smith.

John C. Dana, a witness on behalf of the complainants, testified (R., 115) that he is the librarian of a public library at Newark, N. J., and is familiar with the general body of juvenile fiction published in the United States. He is acquainted with the "Tip Top Weekly" published by Street & Smith, and acquainted in a general way with the contents of the various issues of this publication. The moral tone of the weekly is good. He found nothing in the publication of a demoralizing character, and his inquiries in regard to this particular magazine and others like it lead him to con-

clude that it is not particularly injurious, as compared with others of a like character. On cross-examination the witness does not think that the adventures of Frank Merriwell furnish an exact portrayal of college life, although the college life serves as a thread on which to hang the stories. He did not consider that the "Tip Top Weekly" furnished an atmosphere of discontent with existing conditions that is generally injurious to young boys; that in fact it is often decidedly above the shop and street corner on which boys spend much of their time. In the library with which witness was connected these publications are not classified under the magazine division, but under the book division (R., 119). Witness considered the question of classification largely depended upon the binding and printing.

The testimony of the plaintiffs was thereupon closed.

Harwood M. Bacon, on behalf of the defendant, testified (R., 121) that he was the Superintendent of the Division of Classification, office of the Third Assistant Postmaster-General, and held that position during the month of June, 1907. Witness has frequently held hearings respecting the admission and continuance of matters in the second class of mail, under the rule found on page 31, paragraph 8, section 19, of the Post-Office Regulations for 1902. Mr. W. H. Heines, representing Street & Smith, called on witness about June 11th, 1907, presenting a card bearing the indorsement of the Third Assistant Postmaster-General, in his own handwriting. Mr. Heines had nothing material to say to the witness, and merely handed him briefs in the cases of Street & Smith and the Frank Tousey publishing companies relative to the publications known as "Tip Top Weekly" and "Work and Win." The witness asked Mr. Heines at this time whether or not he had anything further to say, to which Mr. Heines made reply that he had not, except that he desired to have the Department consider, in connection with the cases, a little pamphlet which showed the high regard

in which the clergy held the publication. A copy of this pamphlet was handed witness. Witness told Mr. Heines that the brief and pamphlet would be carefully considered. Witness did not say anything to Mr. Heines suggesting or inducing him not to make a statement or argument, and he did not tell Mr. Heines that he could not do so. Mr. Heines appeared perfectly satisfied to rest his case upon presentation of the brief and pamphlet. Witness testified that in the course of his duties as chief of the Division of Classification he had to do with the matter of classifying publications as the second or third class of mail, and that his actions on these occasions were among his general duties. On cross-examination witness testified that the hearing referred to in the rule to show cause of the Post-Office Department took place before him, and not before the Third Assistant Postmaster-General. Witness has always understood that a notice to the publishers to appear at a hearing, as in this case, meant that the hearing would be either before the Third Assistant himself, or the Acting Third Assistant, or before the Superintendent of the Division of Classification, as the circumstances warranted. If any oral argument is made before the witness, it is his usual practice to make a brief statement of the facts presented, for the consideration of the Third Assistant Postmaster-General, in his final passing upon the questions at issue. No questions were asked Mr. Heines about the publications. No facts material to the inquiry were presented to Mr. Heines, as it was incumbent upon Mr. Heines to present the facts to the Department. On redirect examination witness testified that the citation in the present case was issued with his knowledge and approval. Witness stated to Mr. Heines that he had examined the briefs, and that they apparently covered the cases very comprehensively. His understanding of the attitude of Mr. Heines was that he was perfectly willing to rest his case on the written argument which he presented, and the pamphlet. So far as witness knew, the Third Assistant Postmaster-

General, in deciding the case, considered only the facts and evidence contained in the answer and pamphlet filed by Mr. Heines, and those apparent upon an inspection of the copies of the publications.

Jackson A. Due was called as a witness for the defendant, and testified (R., 130) that he is the secretary and confidential clerk to the Third Assistant Postmaster-General, and held that position in the month of June, 1907. He remembers the visit of Mr. Heines, which was made in relation to the publications of Street & Smith. Mr. Heines asked to see the Third Assistant Postmaster-General, and as the Third Assistant was engaged, Mr. Heines was sent down to the Superintendent of the Classification Division. The witness told Mr. Heines to see Mr. Bacon, and after he had gone over the matter with him, if he then wanted to see the Third Assistant Postmaster-General, he could come back. Mr. Heines was in the office on two days. On cross-examination witness stated that the handwriting on the card, consisting of Mr. Bacon's name and the initials A. L. L., appeared to be in the handwriting of the Third Assistant Postmaster-General. Mr. Heines' card was taken in to the Third Assistant Postmaster-General, and he himself wrote the words and initials on it.

Zed H. Copp was introduced as a witness for the defendant (R., 133), and testified that he lived in Washington, and was a minister of the gospel by profession. Since June, 1900, witness was engaged in sociological work, and is now the chief probation officer of the Juvenile Court. Under objection witness testified that frequently in the Juvenile Court delinquency is traced directly or indirectly to such class of literature as "Work and Win" and "Tip Top Weekly." Under objection witness stated that the effect of literature of a class similar to these publications is disastrous upon the young mind. From reading such literature there comes an incorrigibility and a restlessness under home ties.

Such literature would unfit a boy for office work, for proper study in school, and would unfit him for a pleasant home relation. Upon cross-examination (R., 140) witness testified that the publications of Street & Smith, which he had read, had been sent to him by Mr. Webster from the Post Office Department. Witness did not think that some of the Alger stories or books were suitable for the young, but that others were far superior to the class of publications in question in this suit.

A. L. Lawshe was produced as a witness on behalf of the defendants (R., 147), and testified that he is the Third Assistant Postmaster-General, and was such during the months of May and June, 1907. He issued the citations to Street & Smith and the Frank Tousey Company. Witness considered the answer and other papers in the case, in company with the Superintendent of the Division of Classification, who had immediate charge of the matter. Witness rendered the decision of the Department in these cases. On cross-examination witness testified that he had understood that the second-class mail privilege had been extended to the publications of these firms for a long time. He did not know whether the character of the publications had been changed or not. The matter of the improper classification of this class of mail was first brought to the attention of the witness by a letter coming from the Director of Posts of the Philippine Islands. On a subsequent date (R., 151) the witness produced the letter from the Director of Posts. Upon further cross-examination the witness testified that he did not advise the publishers of any further grounds of objection to their publications other than those stated in the citation issued to them. Witness stated that the opinion of the Assistant Attorney General for the Post Office Department was obtained after the issuance of the citation and the granting of the hearing at which the publishers filed their briefs.

Harwood M. Bacon was recalled as a witness on behalf of the defendants (R., 164), and testified that Mr. Heines called at his office on June 10th and 11th, but that he did not call at the office on June 12th. No appearance was made by the publishers on June 12th.

William H. Heines was recalled on behalf of the complainants, and his testimony was offered in rebuttal (R., 168). Witness testified that he tried to draw out Mr. Bacon relative to the publications when he called at his office. Witness testified that during the interview with Mr. Bacon, he was standing before Mr. Bacon's desk, and was within a few feet of him, but was not asked to sit down. Witness introduced himself to Mr. Bacon. Witness came from New York, instead of mailing his brief, to see what the post-office authorities had to say about his brief, and to get their answer. Witness did not understand that Mr. Bacon was to give him a hearing, and did not recognize Mr. Bacon in this case, but expected the Third Assistant Postmaster-General to hold the hearing. Witness was not told that Mr. Bacon would conduct the hearing. On cross-examination witness testified that he was not an attorney, and had no connection with the Frank Tousey Company, except as their representative in this case. Witness testified that he returned to New York on the 11th instant, and did not wait over until the 12th, the following day. On redirect examination, witness testified under objection that he had been employed by the firm of Street & Smith for twenty years, and knew more about the characteristics of "Tip Top Weekly" than any one except the editor, and was acquainted with its make-up, contents, the manner in which it is printed and published, and the way in which it is circulated. On cross-examination witness testified that at the time of his visit to the Post Office Department, there was nothing in his mind that he desired to say, other than what had been incorporated in his brief, and that he felt that he did not get a hearing, because he was not asked questions.

ASSIGNMENT OF ERRORS.

The Supreme Court of the District of Columbia erred in entering the decrees of June 11, 1909:

1. The court erred in holding that the orders of the Third Assistant Postmaster-General of July 26, 1907, revoking appellees' certificates of entry of March 1, 1897, and Dec. 8, 1898, were issued without a hearing such as is provided by law.

2. The court erred in holding that the appellees were denied due process of law by the Third Assistant Postmaster-General in the issuance of the orders of July 26, 1907, revoking appellees' certificates of entry of March 1, 1897, and Dec. 8, 1898.

3. The court erred in granting an injunction restraining the Postmaster-General from enforcing and continuing the cancellation of the certificates of entry of March 1, 1897, and Dec. 8, 1898.

4. The court erred in assuming jurisdiction to review and inquire into the decision and judgment of the Postmaster-General with reference to a matter involving the exercise of his judgment and discretion upon evidence submitted to him.

5. The court erred in directing and controlling, by the writ of injunction, the current and regular business of the Post Office Department in the receipt, classification and transportation of the mails.

6. The court erred in granting the injunction restraining the Postmaster-General from refusing to receive and

transmit through the mails as second-class matter the issues of "Tip Top Weekly" and "Work and Win."

7. The court erred in assuming jurisdiction to decide that "Tip Top Weekly" and "Work and Win" were entitled to be carried through the mails as mailable matter of the second class.

ARGUMENT.

Point First.

The court erred in holding that the orders of July 26, 1907, were issued by the Third Assistant Postmaster-General without a hearing as provided by law.

The Third Assistant Postmaster-General issued an order, on July 26, 1907, revoking the authority formerly granted to the "Tip Top Weekly" and "Work and Win" to pass through the mails at the second-class rate of postage. If the Third Assistant Postmaster-General had jurisdiction of the subject-matter of this order, and, acting in accordance with the authority given him by law, issued the order, we contend that the lower court was in error when it enjoined the Postmaster-General from enforcing the order.

The post-office appropriation bill of March 3, 1879 (20 Statutes at Large, 355, 358), provides in section 7:

> "Sec. 7. All mailable matter shall be divided into four classes;
> "First, written matter;
> "Second, periodical publications;
> "Third, miscellaneous printed matter;
> "Fourth, merchandise."

In the post-office appropriation bill of March 3, 1901 (31 Statutes at Large, 1107), it is provided:

> "When any publication has been accorded second-class mail privileges, the same shall not be suspended or annulled until a hearing shall have been granted to the parties interested."

The classification of the mail under the law is imposed upon the Third Assistant Postmaster-General (Postal Laws and Regulations, 1902, section 19). In the office of the Third Assistant Postmaster-General there is a specific division devoted to the classification of mail matter, and under it falls the consideration of all questions relating to the classification of mail matter (Postal Laws and Regulations. 1902, section 19, article 8).

The form of the applications for the entry of publications as second-class mail matter is set out in the Postal Rules and Regulations, 1902, section 438, *et seq.* By section 442 the Third Assistant Postmaster-General is required to pass upon the admissibility of publications as second-class matter.

Congress has provided that the head of each Department is authorized to prescribe rules and regulations not inconsistent with law for the government of his Department, and it is well settled that these regulations have the force of law, and the courts will take judicial notice of them.

Revised Statutes of the United States, 161.
Gratiot v. U. S., 4 How., 80, 117.
Ex parte Reed, 100 U. S., 13.
Glavey v. U. S., 182; U. S., 606.

It is apparent, then, that the Third Assistant Postmaster-General is the person authorized to decide within the provisions of the law whether a work is entitled to be entered in the mails as second or third class mail matter. Indeed, no question has been raised, either in the pleadings or in the evidence taken, relative to the authority of the Third Assistant Postmaster-General.

The principal point raised by the bills of the complainants,

and the point to which the evidence taken in this case was particularly directed, is that the Third Assistant Postmaster-General was without jurisdiction to pass the order of July 26, 1907. This argument was based upon the contention that there had been no hearing held by the Third Assistant Postmaster-General, as is provided by the act of March 3, 1901, before the order was issued revoking the certificate of entry of these works as second-class mail matter.

The word "hearing" in legal phraseology relates to the trial of a chancery suit. It is, however, a word frequently used in statutes of the class now under consideration, and the authorities draw no distinction between this word and the constitutional provision which requires "due process of law."

A leading case on the question of what is due process of law is that of *Davidson v. New Orleans,* 96 U. S., 97. In this case there was an assesment of certain real estate in the city of New Orleans, for the purpose of draining swamps within the neighboring parishes of Carroll and Orleans. It was contended that the statute authorizing the assessment was void because it took private property without due process of law. The court held that it was due process of law within the meaning of the Constitution when the statute required, as in this case, that the fixing of the tax or the assessment, before it becomes effectual, must be submitted to a court of justice with notice to the owners of the property, all of whom have a right to appear and contest the assessment. The court also held in this case that due process of law did not require in all cases the resort to a court of justice.

See also:

Hagar v. Reclamation District, 111 U. S., 701.
Wurts v. Hoagland, 114 U. S., 606.
Falbrook v. Bradley, 164 U. S., 171.

In the case of *Holden v. Hardy,* 169 U. S., 366, the court had under consideration due process of law as applicable to a criminal case. In referring with approval to the decision

of the court in *Davidson v. New Orleans, supra,* the court says:

> "Recognizing the difficulty in defining with exactness the phrase 'due process of law,' it is certain that these words convey a conformity with natural and inherent principles of justice, and forbid that one man's property or right to property shall be taken for the benefit of another or for the benefit of the State, without compensation; and that no one shall be condemned in his person or property without an opportunity of being heard in his own defense."

In the case of *Pittsburg Railway Co. v. Backus,* 154 U. S., 421, the Supreme Court of the United States had under consideration an act of the legislature of the State of Indiana which provided for the taxation of certain corporations. This act created a board which was required to convene at times stated for the purpose of assessing railroad property and equalizing the assessments of real estate. It was claimed that the act was unconstitutional in view of the fact that it did not require the State board to grant the railroad companies any hearing or opportunity to be heard for the correction of errors at any time after the assessments had been agreed upon by the board.

In passing upon the question the court said, at page 426:

> "A hearing before judgment with full opportunity to present all the evidence and the arguments which the party deems important, is all that can be adjudged vital."

The Supreme Court had under consideration a writ of error from New York to review a judgment and order finding a certain party guilty of misconduct in neglecting to pay personal taxes and ordering that he stand committed until he should have paid the amount of the said taxes with interest and costs. In this case of *Palmer v. McMahon,* 133 U. S., 660, it was argued that this law of the State of New York under which

the tax had been assessed was unconstitutional, in that it deprived the party of his property without due process of law. The court said, at page 668:

> "It is insisted that Palmer had no notice and no opportunity to be heard; to confront or cross-examine the witnesses for the taxing authorities or to subpœna witnesses in his own behalf; and had not otherwise the protection afforded in a judicial trial upon the merits. The phrase 'due process of law' does not necessarily mean a judicial proceeding. 'The nation from whom we inherit the phrase "due process of law," ' said this court, speaking by Mr. Justice Miller, 'has never relied upon the courts of justice for the collection of her taxes, though she passed through a successful revolution in resistance to unlawful taxation.' *McMillen v. Anderson,* 95 U. S., 37, 41.
>
> "The power to tax belongs exclusively to the legislative branch of the Government, and when the law provides for the mode of affirming or contesting the charge imposed, with such notice to the person as is appropriate in the nature of the case, the assessment cannot be said to deprive one of his property without due process of law. *Spencer v. Merchant,* 125 U. S., 345; *Walston v. Nevin,* 128 U. S., 578. The imposition of taxes is in its nature administrative and not judicial, but assessors exercise quasi-judicial powers in arriving at the value, and opportunity to be heard should be and is given in all just systems of taxation according to value."

The latest opinion of the Supreme Court of the United States on the question of "due process of law" is found in the case of *Londoner v. Denver,* 210 U. S., 373. The court in this case had under consideration a tax assessment imposed by the legislature of the State of Colorado. This tax was assessed under the provisions of the charter of the city of Denver, which charter conferred upon the city the power to make local improvements and to assess the cost upon the property specially benefited. The court reviewed this con-

tention that the parties had been denied due process of law in the following language, found at page 385:

> "The facts out of which the question on this assignment arises may be compressed into small compass. The first step in the assessment proceedings was by the certificate of the board of public works of the cost of the improvement and a preliminary apportionment of it. The last step was the enactment of the assessment ordinance. From beginning to end of the proceedings the land owners, although allowed to formulate and file complaints and objections, were not afforded an opportunity to be heard upon them. Upon these facts was there a denial by the State of the due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States?
>
> "In the assessment, apportionment, and collection of taxes upon property within their jurisdiction, the Constitution of the United States imposes few restrictions upon the States. In the enforcement of such restrictions as the Constitution does impose, this court has regarded substance and not form. But where the legislature of a State, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be levied, and of making its assessment and apportionment, due process of law requires that at some stage of the proceedings before the tax becomes irrevocably fixed, the tax-payer shall have an opportunity to be heard, of which he must have notice, either personally, by publication, or by a law fixing the time and place of the hearing. (Cases cited.) It must be remembered that the law of Colorado denies the land owner the right to object in the courts to the assessment, upon the ground that the objections are cognizable only by the board of equalization.
>
> "If it is enough that, under such circumstances, an opportunity is given to submit in writing all objections to and complaints of the tax to the board, then there was a hearing afforded in the case at bar. But we think that something more than that, even in proceedings for taxation, is required by due process of

> law. Many requirements essential in strictly judicial proceedings may be dispensed with in proceedings of this nature. But even here a hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal. *Pittsburg, etc., Railway Co. v. Backus,* 154 U. S., 421, 426; *Fallbrook Irrigation District v. Bradley,* 164 U. S., 112, 171, *et seq.* It is apparent that such a hearing was denied to the plaintiffs in error. * * * The assessment was therefore void, and the plaintiffs in error were entitled to a decree discharging their lands from a lien on account of it."
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> *Londoner v. Denver,* 210 U. S., 373, 385.

From a consideration of these cases in the Supreme Court of the United States, it becomes apparent that the essential elements of due process of law are notice and an opportunity to be heard. It does not require that the party shall have a day in a regularly organized court in which to present his case. It only requires that there be a body adapted to consider the end to be obtained, and that a hearing be provided before this body after due notice. It is not essential that the party should appear formally, but the requirements of the law are complied with if the party has an opportunity to be heard, even though he does not appear.

One of the leading cases on this question of due process of law is that of *Stuart v. Palmer,* 74 N. Y., 183. In this case there was involved a tax assessment which was levied by three freeholders, who were to be appointed by the Supreme Court. The case was brought by a party to vacate an assessment upon certain lands, and to restrain the collector from collecting the assessment. The court says, at page 191:

> "It is difficult to define with precision the exact meaning and scope of the phrase, 'due process of law.' Any definition which could be given, would probably fail to comprehend all the cases to which it would apply. It is probably wiser, as recently stated by Mr.

Justice Miller of the United States Supreme Court, to leave the meaning to be evolved 'by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded.' (*Davidson v. Board of Administrators of New Orleans,* 17 Albany Law Journal, 223.) It may however be stated generally that due process of law requires an orderly proceeding adapted to the nature of the case in which the citizen has an opportunity to be heard, and to defend, enforce, and protect his rights. A hearing or an opportunity to be heard, is absolutely essential. We cannot conceive of due process of law without this. In his argument in the *Dartmouth College Case* (4 Wheat., 519), Webster defined 'due process of law' as a proceeding 'which proceeds upon inquiry and renders judgment only after trial.' Mr. Justice Edwards in *Westervelt v. Gregg* (12 N. Y., 209) defines it as follows: 'Due process of law undoubtedly means in due course of legal proceedings according to those rules and forms which have been established for the protection of private rights.' Judge Cooley in his work on Constitutional Limitations, at page 355, after saying that 'due process of law' is not confined to ordinary judicial proceedings but extends to all cases where property is sought to be taken or interfered with, says, that 'due process of law in each particular case means such an exertion of the powers of Government, as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as these maxims prescribe for the class of cases to which the one in question belongs.' It has always been the general rule in this country, in every system of assessment and taxation, to give the person to be assessed an opportunity to be heard at some stage of the proceeding. That 'due process of law' requires this, has been quite uniformly recognized."

Stuart v. Palmer, 74 N. Y., 183, 191, 192.

In an action upon a bond given by a party to obtain the discharge of a vessel which had been seized by a warrant of

attachment, the Court of Appeals of New York had under consideration what constitutes due process of law. In discussing this question the court, in *Happy v. Mosher,* 48 N. Y., 317, held:

> "A brief definition of due process of law is 'law in its regular course of administration through courts of justice.' (2 Kent. Com., 13.) And it need not be a legal proceeding according to the course of the common law; neither must there be personal notice to the party whose property is in question. It is sufficient if the kind of notice is provided by which it is reasonably probable that the party proceeded against will be apprised of what is going on against him, and an opportunity is afforded him to defend. (*In the Matter of Empire City Bank,* 18 N. Y., 200; *Rockwell v. Nearing,* 35 N. Y., 302.)"
>
> *Happy v. Mosher,* 48 N. Y., 317.

> "Nothing is more clearly established by a weight of authority absolutely overwhelming than that notice and opportunity to be heard are indispensable to the validity of the proceeding."
>
> *Railroad Tax Cases,* 13 Fed. R., 722, 752.

A statute of the State of Arkansas provided for sale of certain property when the owners of that property had been delinquent in the payment of taxes. The statute in effect provided that where a purchaser had possession of land for two years under a tax sale he was entitled to deprive the owner of his right to it without a trial, hearing, or notice. The Circuit Court of the United States for the Eastern District of Arkansas in *Alexander v. Gordon,* 101 Fed. R., 92, held under the facts in the case that this tax sale did not deprive the owner of his property and that the tax title was acquired without due process of law. The court, at page 96, said:

> "The Constitution of the United States and the constitution of the State of Arkansas contain the

> basic principle of English jurisprudence—that no person shall be deprived of his life, liberty or property without due process of law. Const. U. S., Amend., Art. 14; Const. Ark., Art. 2, Sec. 21. Chancellor Kent said, 'The better or larger definition of due process of law is that it means law in its regular administration through courts of justice.' 2 Kent Comm., 13. While it is difficult and unwise to undertake to accurately define the term, it is certain that due process must be a course of legal proceedings according to those rules and forms which have been established for the protection of private rights. It must be one that is appropriate to the case, and just to the party affected. It must give to the parties affected an opportunity to be heard, respecting the justice of the disposition of the property whose title it seeks to devest."
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> *Alexander v. Gordon,* 101 Fed. R., 92, 96.

In the case of *In re Rosser,* 101 Fed. R., 567, the Circuit Court of Appeals for the Eighth Circuit had under consideration a bankruptcy case. The bankrupt had been committed to jail until he had complied with the order of the court to pay over certain property. It was contended that the order of commitment had been passed without due process of law. The court held:

> "A more serious question is presented by the contention of the bankrupt, that the proceedings in the court below did not give him such notice of, and such an opportunity to be heard upon, the propriety of the order for the payment of this money as constituted due process of law. Chancellor Kent says: 'The better and larger definition of due process of law is that it means law in its regular administration through courts of justice.' 2 Kent Comm., 13. While it is perhaps impossible, and it is certainly unwise, to attempt to give a concise and comprehensive definition of the terms 'due process of law' and 'law of the land,' it is certain that notice to the party to be affected of the claim against him, and

an opportunity to be heard upon it, are essential elements of every proceeding in a court of justice which can be said to constitute due process of law or to be in accord with the law of the land. 'Perhaps no definition,' says Judge Cooley, 'is more often quoted than that given by Mr. Webster in the *Dartmouth College Case:* By law of the land is most clearly intended the general law; the law which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society.' Cooley, Const. Lim., 431.

"The basic principle of English jurisprudence is that no man shall be deprived of life, liberty or property without due process of law, without a course of legal proceedings according to those rules and forms which have been established for the protection of private rights. Such a course must be appropriate to the case and just to the party affected. It must give him notice of the charge or claim against him, and an opportunity to be heard respecting the justice of the order or judgment sought. The notice must be such that he may be advised from it of the nature of the claim against him, and of the relief sought from the court if the claim is sustained. And the opportunity to be heard must be such that he may, if he chooses, cross-examine witnesses produced to sustain the claim, and produce witnesses to refute it. if a question of fact is in issue, and, if a question of law is presented, the opportunity to be heard must be such that his counsel may, if they desire, argue the justice and propriety of the judgment or order proposed. Judicial orders or judgments affecting the lives or property of citizens in the absence of such a notice and opportunity to the party affected are violative of the fundamental principle of our laws, and cannot be sustained."

In re Rosser, 101 Fed. R., 567.

In the case of *Wedderburn v. Bliss,* 12 Appeals, D. C., 186, this court had under review a petition for a writ of

mandamus against the Secretary of the Interior for disbarring an attorney from practising before the Patent Office. Due notice was served upon the attorney and he made answer to the charges denying their truth. An investigation took place before the Commissioner and Assistant Commissioner of Patents, and a large amount of testimony both for and against the relator was taken and reduced to writing, and a complete record was kept of all the proceedings. Oral argument was had on both sides, and printed briefs were also invited to be filed. The Commissioner in an opinion in writing reviewed the whole case and came to the conclusion that the relator had been guilty of malpractice and excluded him from further recognition before the Department. The conclusion of the Commissioner of Patents, with his reasons, were reported to the Secretary of the Interior, and the Secretary affirmed the Commissioner's action. The court held on page 493:

"Nor is there controversy as to what, in general, would constitute due process of law in such cases as that to which the relator was summoned to respond. Specific charges, due notice of such charges, an opportunity to make specific answer to them, an opportunity to cross-examine the witnesses in support of them, an opportunity to adduce testimony in contradiction of them, an opportunity for argument upon the testimony and upon the law and the facts—and all this before a proper tribunal, competent to render judgment, and which does, in fact, render judgment—this undoubtedly constitutes due process of law under ordinary circumstances to its *fullest* extent, and all this was had in the present instance, if it was competent for the Secretary of the Interior and the Commissioner of Patents to give a hearing in the mode in which it was actually given.

"Upon the claim of the appellant himself, no proper element of due process of law was wanting in the case except the opportunity to submit an argument, oral or written, to the Secretary of the Interior

> in person, after such opportunity had been fully availed of before the Commissioner of Patents. But the right to submit argument is a valuable one, although perhaps not always an essential, part of the hearing that constitutes due process of law."
>
> *Wedderburn v. Bliss,* 12 App. D. C., 486, 493.

It will therefore be noted that in this case the Court of Appeals was not so much setting forth the essential requirements of due process of law as it was reciting the proceedings which had taken place in the case in hand. The court in reviewing the case held that those facts which have been found to have existed constituted in that case due process of law *to its fullest extent.* The question for their consideration, and the only question that was insisted upon in the Court of Appeals, was that after the hearing before the Commissioner of Patents the relator was entitled to an additional hearing before the Secretary of the Interior. This question of the double hearing was what the court had before it, and what the court decided.

In three cases in the Court of Appeals, reported in the 32nd volume of their reports, the court had under consideration the disbarment of certain attorneys before the Department of the Interior. In the case of *Garfield vs. Stevens,* 32 App. D. C., 109, the Supreme Court of the District of Columbia had passed an order directing the Secretary of the Interior to vacate the order disbarring the relators from practice as attorneys before the Department of the Interior and requiring the Secretary of the Interior to restore them to the roll of attorneys. It was admitted that due notice of the charges in the case was given to the relators, and that they were accorded ample time to answer the same; that they were not denied the right to offer evidence, and that they were accorded a hearing. (Page 137.) Upon referring to the statement of the case given at page 116, we find that no witnesses were produced and consequently that no witnesses were cross-examined by the relators.

> "On this record, it was not necessary to produce any witnesses to prove the facts which the relators admitted in their answers and in the evidence offered in support thereof. It became solely a question whether, on the admitted facts, the charges were sustained, and whether the relators had violated the provisions of the act of July 4, 1884, and the laws, rules and regulations of the department governing the practice of attorneys practising before the same. Relators were permitted to make all the arguments desired, and appeared in person and by attorney at the hearing. Relators were not denied the right to be confronted with witnesses, or to refute the testimony with witnesses. The fact is that no witnesses were produced because relators admitted the facts stated in the citation. There was no testimony offered to be refuted, and the relators did offer all the testimony they desired in answer to said charges."
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> *Garfield v. Stevens*, 32 App. D. C., 109, 116.

The Court of Appeals reversed the lower court and held that the Secretary had acted within his rights in disbarring the relators.

In the case immediately following the one just quoted, that of *Garfield v. Gaddis,* 32 App. D. C., 143, there was a similar question presented to the lower court and a similar order passed, requiring the Secretary to restore the name of the relator to the roll of attorneys before the Interior Department. In reversing the lower court, the court of appeals held that the relator had not been denied due process of law.

> "There is but one substantial difference between the facts in that case and this, which needs to be considered. It appears in this case that depositions of Andrews and son taken by the Commissioner of Pensions without notice to relator were used by him in making his recommendation to the Secretary, and by the latter in coming to his conclusion. The use of such testimony without the knowledge, or over the

> protest, of the relator, would undoubtedly amount to a denial of a necessary element in a hearing that responds to the constitutional requirements of due process of law. But it appears that copies of these depositions were delivered to the relator by the Pension Commissioner, and that they were submitted by him in his statement and argument subsequently made before the Secretary pending the consideration of his case. As stated in the Secretary's answer, the relator not only did not object to the consideration of this testimony, but also commented upon the same in his argument."
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> *Garfield v. Gaddis,* 32 App. D. C., 143, 151.

In the case of *Garfield v. Spalding,* 32 App. D. C., 153, which was a review of a proceeding to disbar an attorney before the Pension Office, this court held in affirming the lower court that the relator had been denied due process of law. The court distinguishes this case of Spalding from the two preceding cases of Stevens and Gaddis. At page 158 the court held:

> "In this case the charge was limited to a particular act; namely, the purchase of warrants at an inadequate price; and was specifically denied. Due process of law in such cases requires specific charges, due notice of the same, an opportunity to make specific answers to them, an opportunity to cross-examine the witnesses in support of them, an opportunity to adduce testimony in contradiction of them, and the opportunity for argument upon the law and facts.
>
> *U. S. ex rel. Wedderburn v. Bliss,* 12 App. D. C., 485, 493.

"In considering other charges than those which the relators were called upon to answer, and founding his order of disbarment thereon, the Secretary acted in excess of his jurisdiction in the premises. Even if the charge made warranted the broad interpretation, still, the relators did deny the specific one, and their answers contained no admissions of guilt in

> any other respect. Consequently a finding against them must necessarily have been founded on testimony taken without notice to them, and without opportunity to cross-examine the witnesses, and to the consideration of which they did not assent in any way."
>
> *Garfield v. Spalding,* 32 App. D. C., 153, 158.

Let us consider now in detail the hearing which was accorded the representatives of the publishers in the cases at bar by the Post Office Department.

In the first place, was there a sufficient citation or notice of hearing? The citation in the Street & Smith case appears on pages 9 and 10 of the record. By this citation the hearing is set for Tuesday, June 11, 1907, at 2 p. m., at the office of the Third Assistant Postmaster-General, Washington, D. C. The citation states that the question under consideration is:

> "That the issues of the 'Tip Top Weekly' do not constitute a newspaper or other periodical publication as required by Sections 7, 10, 12, and 14 of the act of Congress of March 3, 1879 (Ch., 180, 1 Supp. R. S., page 246), governing mailable matter of the second class, but are in fact books, which, under Section 17 of said act, are third-class matter and chargeable when sent in the mails at the rate fixed by law for that class of mail matter.
>
> "Your answer, in writing, must be submitted on or before June 11, 1907.
>
> "Should you desire to avoid the expense and trouble incident to a trip to Washington, your written answer will be given the same full and painstaking consideration as though you appeared in person or by representative."

A similar notice was sent to Frank Tousey, Publisher, the only difference being that Frank Tousey, Publisher, was required to submit an answer in writing on or before June 12, 1907, and the notice stated that the hearing would take

place at 2 o'clock on June 12, 1907 (Frank Tousey, Publisher, Record, p. 4).

The time and place are specifically set out in these citations, and the tribunal before whom the hearing is to be had is specifically named. The citation itself states clearly the questions to be heard before the Third Assistant Postmaster-General, and it is said that the issues do not constitute a newspaper or periodical, but are in fact books. But if there were any question about the sufficiency or definiteness of this notice, it is laid to rest by a consideration of the citation served upon the publishers in the case of *Houghton v. Payne,* 194 U. S., 88. This citation is found in Volume 105 of the Records and Briefs of the District of Columbia Court of Appeals, and is as follows:

"OFFICE OF THE POSTMASTER,
"BOSTON, MASS., *April* 4, 1902.

"Messrs. HOUGHTON, MIFFLIN & Co.,
"Pub. of 'Riverside Literature Series,'
"4 *Park St., Boston, Mass.*

"GENTLEMEN: You are respectfully informed that I am directed by the Third Assistant Postmaster-General to inform you that opportunity is given you to show cause why your publication (the Riverside Literature Series) should not be denied second-class rates of postage under the provisions of section 276, Postal Laws and Regulations (a copy of which in enclosed), on the ground that your publication has the characteristics of books.

"The Department informs me that the hearing may take place at this office or at the Department at Washington—preferably at this office. All arguments, statements and evidence submitted by you must be in writing, and this office is instructed that all arguments, evidence, etc., must be submitted to the Department by April 22.

"If you desire to be heard at the Department at Washington you will have to make an appointment with the Third Assistant Postmaster-General.

"Respectfully,

"GEO. A. HIBBARD,
"Postmaster."

In this citation of the Houghton case the Department notifies the publishers that their issues had the characteristics of books, and consequently were not entitled to the second-class rate of postage. The same word "books" is used in the cases at bar. The place and tribunal designated are not as definite and certain as in the citation in the cases at bar. The citation in the Houghton case states that the hearing may take place at the office of the postmaster in Boston, Massachusetts, or at the Department at Washington. No such uncertainty exists in the citation in the cases at bar. In the Houghton case, as in the cases at bar, the publishers were permitted to submit their answers in writing. No question was raised relative to the sufficiency of this citation in the Houghton case, and the Supreme Court of the United States affirmed the action of the Postmaster-General in denying the publishers of the publication there concerned the right to the mails at the second-class rate of postage.

Under the citations in the cases at bar the publishers were entitled, if they desired it, to appear in person before the Post Office Department and present such evidence as they might see fit and argue the case. This citation clearly expressed to the publishers that they had this right if they saw fit to avail themselves of it. Considerable testimony was taken on this point in the court below, and it was there held that the publishers were denied this hearing to which they were entitled.

The whole question of the hearing hinges upon the visits of Mr. William H. Heines to the Post Office Department on June 10 and 11, 1907. Heines was the general manager of the firm of Street & Smith, publishers, and came to Washington in their interest. Heines was not employed in any way by the firm of Frank Tousey, publisher. He arrived in Washington on June 9, 1907, which was Sunday. On June 10th he went to the office of the Third Assistant Postmaster-General, and saw a clerk in the outer office. At

this time Heines handed the clerk two copies of the responses to the citations of the Post Office Department, one for the firm of Street & Smith and one for the firm of Frank Tousey, publisher. He then told the clerk that he represented each of these two firms, but as he was not an attorney-at-law it does not appear in what way he represented Frank Tousey, publisher, unless it was in the matter of bringing to Washington the copy of their answer to the citation. On June 11, 1907, Heines returned to the Post Office Department and made an effort to see the Third Assistant Postmaster-General. He was referred to Mr. H. M. Bacon, the Superintendent of the Classification Division. Heines asked the Superintendent if he, the Superintendent, had anything to say to him. The Superintendent said no; further, that he had nothing else to ask him. The Superintendent said that he had received the document which Heines had left the day before and had read it. Heines then went upstairs and asked to see the Third Assistant Postmaster-General, but was unable to do so. He then returned to the Superintendent's office and requested to be put on record as having called.

Even in the direct examination, which is quoted above, it does not appear that Heines demanded a hearing, or indeed asked for one; but this is more plainly brought out in the cross-examination of Heines. Heines stated on cross-examination that he was not told that he could not make a statement, and that nothing was said to him on the subject at all. Heines stated that he was there to answer questions, and that he made no attempt to say anything which he did not have in his printed brief. He did not say to any one in the Department that he wished to make an argument; he very candidly gives his reasons for wishing to see the Third Assistant Postmaster-General.

On page 54 of the Street & Smith record the following questions and answers appear in Heines' statement:

"Q. When you sent word in to the Third Assistant Postmaster-General, did you send word that you desired to see him personally?

"A. I told the clerk that, yes. I said I would like to meet the gentleman.

"Q. Did you tell him you wanted to make an argument?

"A. No sir, told him I was there in reply to the citation.

"Q. You had previously made the same statement when you were there the same day?

"A. You mean the 11th?

"Q. Yes.

"A. Yes."

It thus appears that not only did Heines, the accredited representative of these two publications, make no demand to be heard in argument, but when he presented himself at the office of the Third Assistant Postmaster-General his reason for wishing to see the Third Assistant Pastmaster-General was, *"I said I would like to meet the gentleman."*

Can this statement of the witness be twisted, even by the ingenuity of the counsel for the appellees, into a formal demand by the witness for a hearing? Here we have the witness submitting a formal answer in writing, and then calling socially upon the Third Assistant Postmaster-General. He did not wait to present his answer to the Third Assistant Postmaster-General in person. He had filed his answer in the Post Office Department as he says on page 176:

"Q. Was there anything in your mind that you desired to say other than what you had incorporated in your answer?

"A. No sir."

A marked distinction is apparent between the case of Street & Smith and that of Frank Tousey, Publisher. Even if this call of Heines at the Department on June 11th could be considered a demand for an oral hearing in the

case of Street & Smith, this could not be considered in the case of Frank Tousey, Publisher, the hearing for which was set for the next day, namely, June 12, 1907. Heines did not even wait over until June 12th, but testifies that he left Washington on the evening of June 11th, and made no attempt to see the Third Assistant Postmaster-General or any one in the Department on June 12th.

Thus we see from the statement of Heines himself that no demand was made upon the Department for a hearing, and no opportunity for cross-examination of witnesses or argument was asked for or required. The position of Heines is made more plain by the testimony of certain witnesses from the Post Office Department. The first and most important of these is Harwood M. Bacon, Superintendent of the Division of Classification in the office of the Third Assistant Postmaster-General. Bacon was in charge of the Division of Classification at the time set for the hearing of the publishers, June 11th and 12th, 1907. He remembered that Heines came in to the room of the witness and handed him briefs in the cases of Street & Smith, and Frank Tousey, Publisher, relative to the publications known as "Tip Top Weekly," "Work and Win," and certain other publications involved. Bacon asked Heines whether or not he had anything further to say, to which Heines made reply that he had nothing further to say, except that he desired the Department to consider in connection with the case a little pamphlet which showed the high regard in which the clergy held the present-day dime novel. This pamphlet is entitled "A General Discussion of the Character and Influence of the Present-day Dime Novel." Bacon denies positively that he said anything to Heines, either suggesting or inducing him not to make a statement or argument. Bacon states that Heines appeared perfectly satisfied to rest his case upon the presentation of the brief and pamphlet. Bacon, as Superintendent of the Classification Division, conferred with the

Third Assistant Postmaster-General at the time he decided the case, and so far as Bacon knew the Third Assistant Postmaster-General considered only the facts and evidence contained in the answer and pamphlet filed by Heines, and those facts which were apparent upon an inspection of the copies of these publications.

Upon consideration of the foregoing facts as applied to the cases cited, it becomes apparent that the issue involved in the present case is whether or not the publishers made demand to be heard orally, in connection with the citation for hearing issued by the Post Office Department on May 17, 1907.

In all cases to which the Government refers there is one principle which stands out very clearly. The Government under the law is required only to give the party an opportunity to be heard. The party must take advantage of this opportunity. This is the case in *Londoner v. Denver,* 210 U. S., 385, and in the other cases cited from the Supreme Court of the United States. The New York cases and the cases cited from the Federal Reporter also support this doctrine, and even in the case of *Garfield v. Spalding,* 32 App. D. C., 154, this court does not hold that the party must be heard, but only that there be opportunity for the party to be heard.

The citation in these cases gave notice of an opportunity to the publishers to appear and have a hearing. On June 10th, the day before the hearing in the Street & Smith case, and two days before the hearing in the Frank Tousey, Publisher, case, a representative of the firm of Street & Smith appears and presents a full answer to the charges raised by the citation of the Post Office Department. That representative comes back on June 11th, the date set for the Street & Smith hearing, and comes back, not demanding a hearing, not prepared to produce any further evidence, not accompanied by an attorney to argue the case, but simply

comes back, as the representative himself says, "to answer questions," if any be asked him. The effort this representative made to see the Third Assistant Postmaster-General was purely a social one by his own statements.

The same course of reasoning obtains with reference to the hearing on June 12th afforded Frank Tousey, Publisher. Frank Tousey, Publisher, had notice from the Department that they had opportunity for a hearing before the Department on this day. An answer and brief was filed in their behalf before the Post Office Department. No attorney appeared for them at the hearing on June 12th, no witnesses nor evidence other than the answer were produced at that time, no further arguments were made. Indeed, Heines, who represented them in a limited capacity, and presented their answer on June 10th to the Department, did not appear before the Department on June 12, and no representative of Frank Tousey, Publisher, was present or made any request for a hearing.

We contend in this case that all the requirements of the law relative to the hearing were fully complied with by the Department; an appropriate notice was given each of the publishers, setting a specific time and place for the hearing. The publishers appeared in answer to the citation and filed their formal statement and argument in response to the citation. They did not ask to produce other evidence, and the only suggestion that there could be anything further offered on behalf of the publishers is a paragraph on page 15 of their brief filed before the Post Office Department, which states that if the Department is not satisfied by the answer the publishers beg a further opportunity to present arguments.

SECOND POINT.

In determining the proper mail classification of "Tip Top Weekly" and "Work and Win" the Postmaster-General was required to pass upon questions of law, mixed questions of law and fact, and questions of fact, requiring the exercise of his judgment and discretion, and his finding will not be reviewed or reversed by the courts.

The Postmaster-General, as the head of the Post Office Department, is clothed with plenary power, and is under the bounden duty to examine all matter offered for transmission through the mails of the United States, and to give to it its legal and proper classification and collect and account for all postage to which it is properly chargeable. In the discharge of this duty, he is required to pass upon questions compounded of both judicial and executive character. The work of classifying the mails is attended with many difficulties and perplexities. This is particularly true of second-class mail matter. The act of March 3, 1879, under which such classification is made, is not written in terms of the greatest precision and definiteness. The limitations of section 14 call for sundry and divers inquiries. All the numerous requirements of this class of matter, especially in close and doubtful cases, must be investigated, and the facts ascertained, sifted, and verified. This is followed by a comparison of the established conditions with those requisites specifically demanded by the statute, together with the required characteristics of other classes of mail matter, and finally by an application of all the law involved in the classification of mail matter to the particular state of facts which the investigation has established.

In the case before us, following the customary line of procedure, the Postmaster-General, acting by his assistants,

must make diligent inquiry whether this publication now possesses, or ever did possess, what by common consent are understood to be the necessary form, material, and qualities of a periodical publication, and whether, in addition to these, all statutory limitations and qualifications had been met. Having satisfied himself that these external conditions were present, or waiving further demands in relation to them, he next proceeds to examine its internal makeup and characteristics to see whether they comport with the claim of the publishers that it is in fact and in substance a periodical publication. At the threshold of this effort he is met with various questions. What does the alleged periodical contain? For what is it published? Does it contain a single, unbroken, and complete story and but one such? If it is found that it does, then the next step is to ascertain whether this is true of all the serial issues of the publication, which can be found only by examination and comparison. But in passing upon the question periodical vel book it is necessary to inquire by whom and for what purpose it is used, and how distributed and put upon the market, and, if possible, the popular conception of the publication whether book or periodical. To the answer to all these inquiries, constituting a state of facts, the law is applied, and this *quasi*-judicial act of administration is complete.

It was after such a hearing as this, involving a full and complete inquiry into all the facts and circumstances of the case and an application to them of the plain provisions of the law, that the Postmaster-General, on the 26th of July, 1907, in the regular discharge of his official duty, revoked and cancelled the certificate of entry of the publication "Tip Top Weekly" dated March 1, 1897, and that of "Work and Win," dated Dec. 8, 1898.

We now respectfully submit that in the discharge of this duty, in the regular course of administration, based upon a determination of a state of facts duly made, the Postmaster-

General merely did an act which the law had devolved upon him as a duty belonging to his trust, and from the discharge of which he could not escape, and that the courts have always refused to interfere with such acts when performed as a conclusion reached upon an investigation of facts, provided such act was within his power under the statute. Neither the Supreme Court of the District of Columbia nor any other court possesses any express authority to review or re-examine his action in such cases. It could only be reviewed collaterally, or by the exercise of the power with which the courts are vested to keep executive officers within their statutory bounds by use of the writs of mandamus and injunction. Since the early cases of *Marbury v. Madison* and *Kendall vs. Stokes,* their use for this purpose, in proper cases, has been recognized, but always to compel the discharge of ministerial duties or to determine questions of jurisdiction or power, and not for review by way of writ of error.

> In the case of *New Orleans v. Paine* (147 U. S., 261), the Supreme Court said: "In Noble *v.* Union River Logging Railway Company (*ante,* 165), we had occasion to examine the question as to when a court was authorized to interfere by injunction with the action of the head of an executive department, and came to the conclusion that it was only where, *in any view of the facts that could be taken,* such action was beyond the scope of his authority."

Applying this holding to the case at bar, could it be said, by any license of speech, that "*in any view of the facts that could be taken,* the Postmaster-General was not within the scope of his authority?" He was obeying an express statute compelling him to classify all mail matter, and he was doing it in an approved manner, and after a lawful inquiry as to the facts upon which he acted.

Whatever power the court may possess for reviewing a construction of law made by an executive officer for the purpose

of ascertaining whether he is within the limits of the statute under which he acts, it is settled beyond cavil that a finding of fact by such officer is final and conclusive.

Gardner v. Bonestell, 180 U. S., 362, 370.
Johnson v. Drew, 171 U. S., 93, 99.
Burfenning v. Chicago, etc., R. R. Co., 163 U. S., 321, 323.

The case of *American School of Magnetic Healing v. McAnnulty* (187 U. S., 94), sometimes cited as a disproof of this doctrine, is not only not in conflict with it, but is strongly in support of it. There the American School of Magnetic Healing, of Nevada, Missouri, was using the mails to advertise its so-called methods of healing disease by mental action, and was receiving by mail large sums of money in payment therefor. The Postmaster-General, believing it to be a scheme to get money under false pretenses, through the use of the mails, and being advised that there was no efficacy in magnetic healing, issued a fraud order against the school, and ordered the postmaster at Nevada not to deliver its mail. The case reached the Supreme Court on appeal, and its finding was for the School of Magnetic Healing. The court said on the question of the efficacy of mental healing:

> "There is no exact standard of absolute truth by which to prove the assertion false and a fraud. We mean by that to say that the claim of the complainants cannot be the subject of proof as of an ordinary act; it cannot be proved as a fact to be a fraud or false pretense or promise.
>
> * * * * * * *
>
> "The facts, which are here admitted of record, show that the case is not one which by any construction of those facts is covered or provided for by the statutes under which the Postmaster-General has assumed to act."

By this decision the court meant to say, and did say, that the efficacy of magnetic healing was a mere matter of opin-

ion, the truth or falsity of which was not susceptible of proof, and that there was no statute covering the same, and that, therefore, the Postmaster-General acted without any authority of law; but there was no suggestion that his findings of fact would have been overthrown had the matter in issue been one capable of definite proof.

In the case of *Bates & Guild v. Payne* (194 U. S., 109), a case exactly on all fours with this, the court reaffirmed this long-accepted doctrine in these words:

> "The rule upon the subject may be summarized as follows: That where the decision of questions of fact is committed by Congress to the judgment and discretion of a head of department, his decision thereon is conclusive; and that even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, although they may have the power, and will occasionally exercise the right of so doing."

We believe that a careful examination of the facts and circumstances of these cases will bring them within the rule just cited, and that the court below was without power to review the decision of the Postmaster-General or to control his action by the writ of injunction.

Third Point.

The appellees' publications, "Tip-Top Weekly" and "Work and Win" are not newspapers or other periodical publications as designated by sections 7, 10, 12 and 14 of the act of March 3, 1879, but are books, as designated by section 17 of said act.

The laws of the United States provide four distinct classes of mail matter:

First. Written matter.

Second. Periodical publications.

Third. Miscellaneous printed matter.

Fourth. Merchandise.

Every piece of written or printed matter, or merchandise, entitled to transmission through the United States mails will fall into one of these classes, and it can fall into but one of them. So far as the first and fourth classes are concerned, they are largely defined in the statute in terms of descriptive language, and each is supposed to comprise all matter of its particular class, and hence is exhaustive of all that body of things to which it applies. Thus, written matter, as commonly understood, and as applied to a class, is a thing reasonably easily apprehended, while the term merchandise embraces objects more readily understood.

But when we turn to the second and third classes, both of which comprise objects of the same general kind, namely, printed matter, and are exhaustive of that class, we find the statute defining each in complementary terms of the other, that is, the two classes making up the entire bulk of printed matter, with the inclusions of each indicated by specific enumeration. But as these enumerations are, in the very nature of things, more or less general, it is not always easy to determine to which class certain indistinct and ill-defined portions of printed matter may fall when, in the absence of specific designation, we are compelled to rely upon inference and connotation.

In the act of March 3, 1879, we find the following:

> "SECTION 10. That mailable matter of the second class shall embrace all newspapers and other periodical publications which are issued at stated intervals and as frequently as four times a year and are within the conditions named in sections twelve and fourteen.
>
> "SECTION 12. That matter of the second class may be examined at the office of mailing, and if found to contain matter which is subject to a higher rate of postage such matter shall be charged with postage at the rate to which the inclosed matter is subject.
>
> "*Provided,* That nothing herein contained shall be

so construed as to prohibit the insertion in periodicals of advertisements attached permanently to the same.

"SECTION 14. That the conditions upon which a publication shall be admitted to the second class are as follows:

"First. It must regularly be issued at stated intervals, as frequently as four times a year, and bear a date of issue and be numbered consecutively.

"Second. It must be issued from a known office of publication.

"Third. It must be formed of printed paper sheets, without board, cloth, leather, or other substantial binding, such as distinguish printed books for preservation from periodical publications.

"Fourth. It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers.

"*Provided, however,* That nothing herein contained shall be so construed as to admit to the second-class rate regular publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates.

"SECTION 17. That mail matter of the third class shall embrace books, transient newspapers, and periodicals, circulars, and other matter wholly in print (not included in section twelve), proof sheets, corrected proof sheets, and manuscript copy accompanying the same, and postage shall be paid at the rate of one cent for each two ounces or fractional part thereof, and shall fully be prepaid by postage stamps affixed to said matter."

In section 10 we have designated, in two subdivisions, that portion of printed matter which, when possessing certain specified statutory requisites, shall be entitled to the privileges of second-class mail matter, to wit, newspapers and other periodical publications. It will be noticed that before the subsidized or nominal rates of postage will be accorded to any portion of printed matter, it must first establish its

right to be classed as a newspaper or other periodical publication. The required limitations of certain characteristics cannot exist unless we have first found and recognized that class of printed matter to which, and to which only, the cheap rates of postage will be allowed, and the presence of all these limitations, qualifications, and characteristics can avail nothing unless they are attached to, and form a part of, either a newspaper or periodical publication such as is contemplated by the statute.

Starting now with this class of printed matter as the basis, the prime essential, the *sine qua non* of second-class postage rates, let us not mistake the requisites for the class, the limbs for the trunk, or, in other words, let us not take the qualities which newspapers and other periodicals must possess before they can have access to the second-class mail rates, for the newspapers and periodicals themselves.

Taking, then, newspapers and periodicals as the class, and having established their presence beyond all peradventure, we have not yet made good their title to the second-class rates of postage until we prove that there is coexistent with, and forming a part of, such publications all the characteristic qualities enumerated in section 14, eight of which are positive requirements and four are negatives, three of them relating to form and nine to character or purpose, as follows: as to order, it must be issued at stated intervals; as to frequency, not less than four times a year; as to when, it must bear a date; as to succession, it must be consecutively numbered; as to place, it must be issued from a known office of publication; as to material, it must be formed of printed paper sheets; as to cover, it must *not* be board, cloth, or leather; as to object, it must be (1) originated and published for the dissemination of information of a public character, or (2) devoted to literature, the sciences, arts, or some special industry; as to patrons, it must have a legitimate list of subscribers; as to objects, negatively, it must not be de-

signed primarily for advertising purposes, or free circulation, or circulation at nominal rates.

If a periodical publication fails to possess any one of the positive requisites just enumerated, or possesses any characteristic forbidden, it is not entitled to the second-class mail privilege, while, on the contrary, any publication not a newspaper or a periodical, having present every required characteristic and absent every negative cannot be so entitled for the reason that it fails to come within that class of printed matter to which Congress has extended that favored privilege.

But while it is clear that only newspapers and periodicals, such as were contemplated by the act of March 3, 1879, when possessing the required characteristics, can have access to the second-class mail privilege, and that no other publication, whatever may be its accidents or properties, is entitled thereto, yet the Congress has not, in so many words, defined either a newspaper or a periodical, but has merely overnamed the limitations and qualifications which they must possess as they existed in the legislative mind.

What was intended to be embraced in such publications can only be ascertained by first subtracting from the aggregate bulk of printed matter those classes specifically named as third-class matter in section 17, and taking the remainder for second-class matter, and in all cases of doubt as to whether of the third class or of the second class, those cases falling within the twilight zone between the two, to consult the legislative intent and common experience.

> Section 17 reads: That mail matter of the third class shall embrace books, transient newspapers, and periodicals, circulars and other matter wholly in print (not included in section 12), proof sheets, and manuscript copy accompanying the same.

We have here an enumeration of all classes of printed matter, except the attached advertisements permissibly in-

serted in periodicals, and the *newspapers and other periodical publications* recognized, but not defined, in section 10. The same class of publications are referred to in section 7, as *periodical publications;* in section 12, as *periodicals;* in section 14, as *periodical publications;* in section 15, as *newspapers and other periodicals;* and in section 25, as *periodicals.* These are all cognate terms, synonymous and interchangeable, and denote all that large class of periodical publications which the Congress, as well as the public, at that time, recognized as the vehicles of current thought and happenings.

The special recognition and manifest partiality of Congress for newspapers and other periodical publications was bestowed advisedly and in pursuit of a broad and generous policy. They were singled out from the great mass of printed matter and made the recipients of public favor because of their peculiar use and recognized worth as the carriers of information on such every-day subjects as, from their very nature, could not bide the time of history or stable literature.

There is a broad and clearly distinguishable difference between the purposes of periodicals and those of books, a critical study of which will aid in their correct classification. Each has its distinct and separate functions which indicate its character and identity, and it is by illustration of their use that periodical publications, as they were understood and provided for by the statute, are most clearly and readily defined.

In our daily life, important events are constantly happening, learned discussions are in progress, fresh inquiries are being made, new thought is springing up, and art and science are entering unknown fields, all of which seek and find their first and natural expression in the newspapers, the magazines and the periodical reviews. This is the distinctive province of the periodical publications. They are the transient records of the shifting and passing, occurrences

of the present time. Books are the records of the permanent and the enduring, while the periodical takes note of the recurring and the fleeting.

There are five internal or attendant characteristics in which the book may be distinguished from the periodical, to wit, first, its origin; second, its unity; third, its separation from what precedes or follows; fourth, its subject-matter; and fifth, its treatment by those who use it. Let us briefly note these distinctions.

First. Books are originated and published for the exposition and treatment of the larger and more serious conceptions of the human mind. They are designed to record that which is fixed and stable in the literature of any subject. They relate more to knowledge at rest or in a state of completion, while periodicals are addressed to the transient, the unstable, and the unfinished. The common mind associates with books the idea of permanency and seriousness of purpose, while the periodical suggests the passing, the changeful, and the progressive. Nor is this less true because some books, in scope and purpose, fall below certain periodicals in the gravity and permanence of their contents, for it is to the two classes in their entirety and general formation to which we look for the tokens of distinction.

Second. As a rule, a book has but a single design, treats but one subject only, and its unity marks its distinction from other books, as well as from periodical publications. It was the presence of this one idea or conception in the mind of the author that gave to the book its origin, and while an occasional book may treat of a variety of subjects, or contain several stories, yet the book of common speech and universal understanding is one of a single purpose, while the periodical covers all the numerous and various topics of the broad field of public information of which it is the recognized medium.

Third. Being the expression of a single concept, books are complete in themselves, and have no dependent connection with other books or writings either preceding or following them. While this does not apply to those exceptional cases where a single exhaustive subject is treated in a number of volumes, which are properly but one book, it is yet true to all intents and purposes, and reflects the popular idea of a book. Where the narrative, story, novel, or treatise is complete in a single writing, particularly when appearing alone, and may be bought and used without a prior edition or subsequent connection, it is then the generally recognized and commonly accepted book. There can be no such separation and completion with the periodical for the reason that it is an unfinished and continuing entity, depending for its contents upon the varying events of continuous progress.

Fourth. While the theme of the book and portions of periodical literature may occasionally, to a degree, be the same, yet in the main they are diverse, or when alike, are treated in different degrees and for separate purposes. The events of the recurring present, the happenings of daily life, with their new thought and impluse, can only find their way to the public through the pages of a periodical publication which, though made up of a series of parts, is, nevertheless, a complete and continuous whole.

Fifth. The periodical to which the Congress gave this generous concession of nominal postage rates was the periodical of common speech, of ordinary conception, and popular understanding. The average man knows the import of the word periodical and likewise of the term book. In his mind he associates with newspapers and other periodicals the current news, the daily press, the mails, and the report of human progress in action, while with books he associates the shelves of the book stand and the library and other repositories of more permanent literature, and although they may

have assumed the guise of periodicals and found their way to the newsdealer, yet the common notion of books will follow them still, and this distinction by the popular mind is a most interesting factor in determining, in doubtful cases, the question of periodical or book.

Having now tried to draw the distinction between books, or mailable matter of the third class, and periodicals, or mailable matter of the second class, and attempted to define each as contemplated by the act of March 3, 1879, let us next examine the appellees' publications, "Tip Top Weekly" and "Work and Win," and see whether we can correctly determine to which of the two classes they belong and the consequent rate of postage to which they are entitled.

An examination of any exhibits in the record, or any antecedent number, will reveal a thin book, paper bound, eleven inches long and eight inches wide, and containing thirty-two pages. On the front cover, at the upper left-hand corner, are found the number of the series and the date of issue; in the upper right-hand corner appears the price, while between these two are the name of the hero of the story and the subject, followed by the name of the publication, "Tip Top Weekly," in large letters, with the advertisement, "An Ideal Publication for American Youth" just below.

Turning to the inside of the publication, we find almost the entire volume taken up with a single, complete, and disconnected story of adventure, leaving but three or four unoccupied pages, which are given over to letters puffing the publishers' books, and to advertisements.

While in each issue the protagonist of the story, Dick Merriwell, is the same, yet the theme, the scene, the other characters, and the whole adventure are shifted, and a new, complete, and independent story is evolved, without dependence upon, or reference to, any previous story, and without the introduction of any characters or plots demanding another story to relieve the persons or round out the event.

All these stories will be searched in vain for any part, quality, characteristic, or condition calling for periodicity in their publication. The periodical name, "Tip Top Weekly," can in no wise change the internal character of the publication. Its true classification can only be determined by what it intrinsically is, and not by what it externally appears to be.

If we are correct in the distinctions drawn and the deductions made as to the second and third classes of mailable matter, then we cannot escape the conclusion that "Tip Top Weekly" is a book, and not a periodical publication. Internally the characteristics of a book are present, and those of a periodical publication are absent. It was originated for the purpose for which books are employed, namely, to put upon the market complete, finished, and detached works of fiction; it has all the unity and singleness of object which books possess; it has no necessary or dependent connection with anything that precedes or follows it, no continuity from and to any like publication; its subject-matter is one to which books are dedicated, and it is bought and read and treated as a book by those who use it, leaving nothing but a periodical name, the word "weekly," and a paper cover to plead its cause as second-class mail matter.

More than five hundred issues of this publication have been published within the last twelve years, and if each and every issue, as so many complete stories, had come from the press at the same time every purpose of this publication would have been met, and the fiction of periodicity, in order to obtain second-class mail rates, would have been spared. There is no genuine public demand for these books that has any connection with periodicity, but such demand only as ordinarily rises for spirited and sensational juvenile literature, the appearence of which has been heralded by advertisement, and which would have existed had they been published a score of years ago at one time instead of weekly up to the present time.

In support of the contention that this publication is not

affected by periodicity, attention is called to the fact that each issue advertises for sale the back numbers. While it is true that the issues are put upon the market weekly, yet this is but a mere order of supply, as there is nothing in the period of one week, or in the so-called serial appearance of the publication, that gives to it any color of character or stamp of merit.

Now let us see what the publishers themselves think of this publication in the matter of its being a book. On page 43 of the record Mr. Ormond G. Smith, one of the publishers, swears that portions of these stories, without being rewritten, edited, or changed, are collected in volumes, bound, and put upon the market, two or three numbers forming a book of over three hundred pages of duodecimo size. If two or three of these stories, without change, will make a book, why is one not a book? At most, the only difference would be one of size, and there is neither law nor custom regulating the size of books. A single one of these stories would make a book of over one hundred pages, seven by four inches in size, which is almost identical in bulk with the "Riverside Literature Series," which the Supreme Court has already held to be books, and chargeable with third-rate postage.

In the well-known case of Houghton *v.* Payne (194 U. S., 88), decided April 11, 1904, and exactly parallel with the case at bar, the Supreme Court of the United States, in distinguishing between books and periodicals, said:

> "But while section 14 lays down certain conditions requisite to the admission of a publication as to mail matter of the second class, it does not define a periodical, or declare that upon compliance with these conditions the publication shall be deemed such. In other words, it defines certain requisites of a periodical, but does not declare that they shall be the only requisites. Under section 10 the publication must be a 'periodical publication,' which means, we think, that it shall not only have the feature of periodicity, but that it shall be a periodical in the ordinary mean-

ing of the term. A periodical is defined by Webster as 'a magazine or other publication which appears at stated or regular intervals,' and by the Century Dictionary as 'a publication issued at regular intervals in successive numbers or parts, each of which (properly) contains matter on a variety of topics and no one of which is contemplated as forming a book of itself.' By section 10 newspapers are included within the class of periodical publications, although they are not so regarded in common speech. By far the largest class of periodicals are magazines, which are defined by Webster as 'pamphlets published periodically, containing miscellaneous papers or compositions.' A few other nondescript publications, such as railway guides, appearing at stated intervals, have been treated as periodicals and entitled to the privileges of second-class mail matter. Payne *v.* Railway Pub. Co., 20 D. C. App., 581. Publications other than newspapers and periodicals are treated as miscellaneous printed matter falling within the third class.

"While it may be difficult to draw an exact line of demarkation between periodicals and books, within which latter class the "Riverside Literature Series" falls, if not a periodical, it is usually, though not always, easy to determine within which category it falls, if the character of a particular publication be put in issue.

"A periodical, as ordinarily understood, is a publication appearing at stated intervals, each number of which contains a variety of original articles by different authors, devoted either to general literature of some special branch of learning or to a special class of subjects. Ordinarily each number is incomplete in itself, and indicates a relation with prior or subsequent numbers of the same series. It implies a continuity of literary character, a connection between the different numbers of the series in the nature of the articles appearing in them, whether they be successive chapters of the same story or novel or essays upon subjects pertaining to general literature. If, for instance, one number were devoted to law, another to medicine, another to religion, another to

music, another to painting, etc., the publication could not be considered as a periodical, as there is no connection between the subjects and no literary continuity. It could scarcely be supposed that ordinary readers would subscribe to a publication devoted to such an extensive range of subjects.

"A book is readily distinguishable from a periodical, not only because it usually has a more substantial binding, (although this is by no means essential), but in the fact that it ordinarily contains a story, essay or poem, or a collection of such, by the same author, although even this is by no means universal, as books frequently contain articles by different authors. Books are not often issued periodically, and, if so, their periodicity is not an element of their character. The reason why books of the Riverside Literature Series are issued periodically is too palpable to require comment or explanation. It is sufficient to observe that, in our opinion, the fact that a publication is issued at stated intervals, under a collective name, does not necessarily make it a periodical. Were it not for the fact that they are so issued in consecutive numbers, no one would imagine for a moment that these publications were periodicals and not books. While this fact may be entitled to weight in determining the character of the publication, it is by no means conclusive, when all their other characteristics are those of books rather than those of magazines.

"The fact that these publications are not bound when issued or intended for preservation, is immaterial, since in France and most of the continental countries nearly all books, even of the most serious and permanent character, are usually issued in paper covers, thus leaving each purchaser to determine for himself whether they are worth a binding of more substantial character and preservation in his library. It is true that in this subdivision of section 14 it is said that a periodical must be without such substantial binding as to distinguish printed books for preservation from periodical publications, but it is by no means to be inferred from this that to constitute

> a book the publication must have a substantial binding."

In the case just cited there was under consideration an issue of publications known as the Riverside Literature Series. The issue was composed of standard works of well-known authors, and compiled in outward appearance, form and manner of issue with the requirements of section 14 of the statute. The Supreme Court of the United States, however, held that the law was plain and distinct and could not be evaded by the compliance with form alone, but that in matters of substance as well as form the publishers had to comply with the law to entitle their publications to pass under the second-class rate of postage.

The Supreme Court held that the publishers had sought to evade the law by issuing their books in *consecutive numbers.* In the cases at bar, the publishers attempt to evade the law by another path; they have the *same or a similar set of characters* in all of the series. They do not deny that each issue of the publication is complete in itself, but they contend that these issues simply trace the adventures of a particular hero and his relatives. The character in "Tip Top Weekly" is Frank Merriwell; the character in "Work and Win" is Fred Fearnot.

As stated by one of the publishers, Sinclair Tousey, in his examination, these works are very similar to those of Oliver Optic and Horatio Alger. It has never been contended that the works of Oliver Optic and Horatio Alger, even though written by the same author, are entitled to second-class mail privileges simply on this account. The use of the name of a protagonist through these various series is simply an attempt on the part of the publishers to evade in a matter of *form* the requirements of the statute. The Supreme Court of the United States would not consent to a similar evasion in the case of *Houghton v. Payne*; and if this court

enters into a discussion of the merits of these works we are certain that they will not consent to any evasion of the law in this respect in the cases at bar.

The complainants alleged in their bill, and have attempted to show, that certain other publications, claimed to be in every way similar to "Tip Top Weekly," have been admitted to the second-class mail privilege by the Postmaster-General, and name the "Black Cat," "All-Story Magazine," and "Smart Set" as illustrations, endeavoring thereby to show lack of uniformity and fixed policy in administration. But we submit that an examination of these periodicals will show that instead of containing one lengthy and complete story, and that only, they contain a variety of short stories by different authors, and some of them other miscellaneous matter, thus bringing them within the legal definition of the Supreme Court in the Houghton case where it is said, as already quoted, "A periodical, as ordinarily understood, is a publication appearing at stated intervals, each number of which contains a variety of original articles by different authors, devoted either to general literature of some special branch of learning or to a special class of subjects."

But if these publications were admittedly similar to "Tip Top Weekly," though it is not so admitted, then their admission upon a misunderstanding of the facts in the case could be nothing more than an unintentional error, and could not have the least bearing one way or another upon the present case, as no number of errors whatever could justify another. It is the policy of the law that each and every publication admitted to the second-class mail privilege is admitted upon the separate and distinct facts of that particular case as an independent act of administration without reference to any other case previously determined, save in so far as it illustrates the general application of the law.

An effort has been made by appellees to prove a high moral tone and excellent literary merit in their publication,

"Tip Top Weekly." Appellant admits that it is not non-mailable on that score, but challenges the claim that the stories contained in these books are such as tend to develop the morals, instruct the intellect, or advance the ideals of juvenile readers. A normal and healthy condition of mind, just and proper notions of life, and worthy and noble ambitions can only be given to the boy, in so far as affected by his reading, by placing in his hands such books as idealize those modes of life, including the commonplace virtues, which are attainable by every youth, and not by firing his brain with thrilling adventures, wild romances, and hair-breadth escapes. Such false ideals can only inspire discontent with home life, disobedience to parents, and a restless and roaming disposition in the mind of boys of tender years. The appellees have the burden of proving that the thrilling experience of lion taming, of shooting bandits, or roving in India, of barnstorming, and like exciting diversions are conducive to calming the excesses, and restraining the passions of exuberant youth. If it be true, as contained in the record, that twelve million copies of this publication have been issued and sold to American boys, it only means that so many millions have had their imaginations more or less fired with unattainable hopes and inordinate ambitions.

FOURTH POINT.

The classification of mail matter is a continuous administrative act, and the Postmaster-General is not bound by an illegal classification made by a former Postmaster-General.

It is the duty of the Postmaster-General to classify each and every piece of mailable matter offered for transmission through the mails, and to give to it that classification to which it is by law entitled, to the end that the legal rate of

postage may be collected. This is a continuous act, a constantly recurring duty, and implies that every distinct piece or package of mail matter accepted for carriage is then and there given the official classification to which its form, shape, material and character entitle it, and although this actual, legal separation may not take place in practice, and may be the accepted classification of the day before, or the month or year before, yet it speaks, and has its legal effect, only as of the date upon which it is accepted for transmission. While newspapers and periodicals, the subsequent copies of which are assumed to be of the same class and kind as the initial copy upon which the actual, practical classification was based, may for a long time be accepted upon the faith of their conformity to the original, yet in theory, and for the purposes of the law, there is assumed to be a re-classification of each succeeding issue, and the Postmaster-General has reserved to himself under the law, the right, and he is under the duty, to make such actual re-classification of any subsequent issue if he has reasons for believing that there has been a change from the original, or that the prior classification has been found to be erroneous because of a mistake in the facts or a misconception of the law at the time of the first admission. Nor is this recurring right and duty waived, relinquished or compromised by the fact that the incumbent Postmaster-General, at the time of the initial classification and admission, gave to the publisher a qualified license or entry certificate, "good while the periodical remains unchanged, or until revoked." This is nothing more, and was never intended to be anything more, than a mere advance approval of the succeeding issues of the periodical upon the faith of the original examination and acceptance, a time and labor-saving device for the postal service and a convenience to the publisher, but subject to re-examination or revocation for cause at any time.

That the Postmaster-General may overrule and reverse a

classification of mail matter made by a former Postmaster-General can admit of no doubt. This right would inhere to him in the very nature of his duties. It would be absurd, as well as unjust, to impose upon him the duty of classifying the mails and collecting the proper postage and at the same time deny to him the necessary power. Now if this were a vested right instead of a grant of privilege, then it would be both unreasonable and unfair to invade a right of property or other value already vested, but we are not dealing with a vested right, we are considering a grant of privilege, which by a universal law of construction will be construed most favorably to the grantor. We do not mean by this to say that second-class mail matter has not a right to the benefit of the mails, or that it could be withheld without cause, but refer to the privilege of subsidized or nominal rates as compared with the other three classes of mail matter.

But Congress itself has recognized the right of a Postmaster-General to reverse the findings of his predecessors by providing conditions precedent to such action.

The act of March 3, 1901, reads:

> "When any publication has been accorded second-class mail privileges, the same shall not be suspended or annulled until a hearing shall have been granted to the parties interested."

If there can be no revocation of a certificate granted by a former Postmaster-General, why is Congress requiring some prior duty before it can be *suspended or annulled?* And if it can be *suspended or annulled,* by whom can it be done? Manifestly by the Postmaster-General, for he is by law given the full control of all postal matters.

The doctrine of *res judicata* can not be invoked for the reason that there was no adjudication whereby a vested right passed to the publishers. There was no contractual agreement between the Postmaster-General and the publishers by which he, for an agreed consideration, gave to them, abso-

lutely and in fee, a thing of value which passed to them as a matter closed, and for the confirmation of which they might invoke the records of a court of jurisdiction. It was simply an administrative acceptance of their publication as second-class mail matter, on a classification then and there made upon the facts before him, applicable to that particular acceptance only, accompanied with the implied understanding that, at the Postmaster-General's pleasure, the same classification, under like conditions, might temporarily continue, but with a reservation of the right of re-examination and reversal at any time, either by himself or his successors in office.

That the right of estoppel could not obtain to the publishers as against the United States will appear at a glance when it is observed that there is lacking an indispensable requisite of estoppel, that of mutuality. There was no obligation on the part of the publishers to continue to publish and mail their publication and pay the Government its accruing postage, and hence there could be no continuing duty of the United States to carry the same unless it first complied with those conditions which under the law gave it that right.

In the case of *Houghton v. Payne,* already quoted from, the court said on this point:

> "Great stress is laid by counsel upon the original interpretation of the term 'periodical,' as applied to these books, which it is said was continued without change under different administrations and by several successive Postmasters-General, and from 1879, the date of the passage of the act, until 1902, when the certificates granted by the former Postmasters-General were revoked by the defendant and a different classification made of the publications now in issue, that the attention of Congress was repeatedly called to the evils and to the large expense incurred by the Government by the admission of publications of this description to mail matter of the second class; that Congress seriously considered these representations,

and committees made voluminous report thereon, yet Congress persistently refused to change by legislation the ruling of the Postmasters-General in that regard.

"We had occasion to consider this subject at length in the case of *United States v. Alabama R. R. Co.*, 142 U. S., 615, 621, in which we held that this court would look with disfavor upon a change whereby parties who have contracted with the Government on the faith of a former construction might be injured; especially when it is attempted to make the change retroactive, and to require from a contractor a return of moneys paid to him under the former construction. This case is not open to the same objections. No contract with the Government is set up whereby the latter agreed to carry these publications as second-class mail matter. Much less is any repayment demanded of money paid by the Government under the prior construction. The action of the Government consists merely in the revocation of a certificate or license admitting these publications as mail matter of the second class. No vested right having been created by such certificate, no contract can be said to be impaired by its revocation."

Fifth Point.

The prayers of these bills are wholly inconsistent with the administration of the business of the Post Office Department.

The complainants have asked that the court declare their publication, "Tip Top Weekly," entitled to be received, entered, and transmitted through the mails as second-class matter. If this means anything at all, it means that the judgments and opinions of the Supreme Court of the District of Columbia, in the classification of mail matter, are to be substituted for those of the Postmaster-General, the public functionary whom the Congress has clothed with that authority and charged with that duty. It is equivalent to say-

ing that although the Postmaster-General, the only person in position to ascertain the facts, after finding that this publication, having no mark of second-class mail matter, save and except a periodical name and a serial number, and having been simulated a periodical for the palpable purpose of getting nominal postage rates, is in fact a book, and chargeable with third-class rates, it must, nevertheless, be permitted to pass as second-class mail matter and pay only second-class rates of postage because in fact his jurisdiction has been withdrawn and confined to the judicial branch of the Government. It would mean that the copies and bundles of the issues of this publication offered to the mails must be received and transmitted without examination, refusal, or interference, and that into whatever form or character it might degenerate it must still be sacredly guarded and protected by the Post Office authorities. And this must be done in spite of the well-known fact that many publications, having at first, in fact and in substance, all the requisites of second-class mail matter, gradually pass into other forms, shapes, and characters, calling for reclassification and a different rate of postage.

But, in general, it means still more, and that is that the courts, already burdened with work, are to be overwhelmed with the bills of dissatisfied publishers, and that the arduous and difficult labors of classification of the mails are to be transferred from the Postmaster-General to the Supreme Court of this District.

That was a timely and potent declaration of the Supreme Court in the case of Bates & Guild *v.* Payne (194 U. S., 109), when it said, speaking of a case like this: "Even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of correctness, and the courts will not ordinarily reverse it." This was said by the court after just having expressly declared that in no case would it review or reverse a finding of facts by the

Postmaster-General, the purport of the entire opinion being to enjoin upon the courts a policy of non-interference with the classification of mail matter.

There is no question of right to the use of the mails involved in this case. It is purely a question of the rate of postage accruing upon a proper classification of mail matter. The sole contention of the Postmaster-General is that while the publication "Tip Top Weekly" is clearly entitled to transmission through the mails, it is, nevertheless, classable as third-class matter and chargeable with postage at the rate of one cent for each two ounces, and not second-class matter and chargeable at the rate of one cent a pound.

The magnitude and difficulty of administering the law governing the second-class mail privilege, and the necessity that the Postmaster-General shall be free from disturbance in the discharge of that duty, may be better understood and more fully appreciated by reference to the work for the fiscal year ending June 30, 1909, during which second-class mail matter was classified and mailed at 10,662 post-offices in the United States, while 4,322 new applications were received and considered, 3,890 of which were admitted and 432 rejected, and of the total number formerly admitted 3,519 had their certificates of entry annulled after a full, fair, and impartial hearing had disclosed the fact that they were not entitled to that privilege.

During the same period there was carried in the United States mails, at the public expense, the enormous amount of 774,801,370 pounds of second-class mail matter for the publishers of newspapers and periodicals throughout the country. Of this carriage 51,568,188 pounds were carried free under the provision for free county delivery of newspapers and periodicals, and 723,232,182 pounds were carried at the nominal cost of one cent per pound, while each and every pound thus carried cost the Government the sum of $8\frac{2}{3}$ cents, causing a net loss of $59,917,120.24, given under the laws of Congress as a generous concession to the publishers with the view of supplying cheaper public information to the people.

With this splendid showing of governmental beneficence and subsidy to the publishers, it is not asking too much that they, in common with all others, should be satisfied with such a construction and administration of the postal laws as will not increase the cost of carrying their periodicals to a sum beyond what was designed by the original intent and purpose of Congress.

Conclusion.

We contend that the publishers of "Tip Top Weekly" and "Work and Win" were given due notice and opportunity for a hearing and did not avail themselves of their privilege. The Post Office Department, having then jurisdiction under the law, revoked the license up to that time granted to these publishers, and required them to pay the rates of postage provided for the third class of mail matter.

This action of the Post Office Department related to a matter which was within the discretion of the Department, and was not such as could be controlled by the courts through the writ of mandamus or injunction. This action of the Post Office Department was proper in the cases at bar, and these publications are rightfully classed as books, and as such required to pay the third-class rate of postage.

We therefore respectfully submit that the decrees appealed from should be reversed, and the cases remanded with directions to dissolve the injunctions and dismiss the bills with costs.

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